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Reconceptualizing Human Rights to Challenge Tobacco

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RECONCEPTUALIZING HUMAN RIGHTS TO CHALLENGE TOBACCO

*Rangita de Silva de Alwis**
*Richard Daynard***

INTRODUCTION.....	292
I. DEFINING AND DEVELOPING A RIGHTS-BASED APPROACH TO TOBACCO CONTROL.....	295
A. Identifying the Relevant Human Rights Instruments to Challenge Tobacco.....	303
B. States' Duty to Protect Against Corporate Abuse	309
C. Regional Human Rights Norms on Right to Life and Health.....	313
D. Treaty Body Monitoring Mechanisms	317
1. <i>Reporting Under the ICESCR</i>	319
2. <i>Reporting Under the ICCPR</i>	321
3. <i>Reporting Under the CRC</i>	322
4. <i>Reporting Under the CEDAW</i>	323
E. Treaty Body Jurisprudence on Tobacco Control	324
II. MAINSTREAMING A GENDER PERSPECTIVE IN TOBACCO CONTROL	328
A. Utilizing CEDAW to Control Women's Exposure to Tobacco.....	338
B. Tobacco and Children's Rights	342
III. TOBACCO CONTROL: A CASE FOR HUMAN RIGHTS LITIGATION	348
A. Transforming International Human Rights Law into Domestic Action	348
B. Tobacco Control as Integral to the Right to Life.....	354

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C. Human Rights Litigation to Protect Health and the Environment.....	360
D. Extending Human Rights Litigation to Protect Women and Children from Tobacco.....	367
CONCLUSION.....	372

INTRODUCTION

All human rights are universal, indivisible and interdependent and interrelated.¹

Great achievements and accomplishments in life are possible if one is permitted to lead an acceptably healthy life.²

The integration of a human rights-based approach to the control of tobacco has begun to gather momentum as an exciting new weapon in the battle against tobacco.³ The purpose of this paper is to examine the multiple ways in which tobacco undermines human rights and explore innovative interpretations of the human rights regime so as to broaden the scope and effectiveness of the human rights framework to control tobacco.

Human rights provide the normative basis for the claim that the right to health involves removing socioeconomic obstacles to health and well-being. Similarly, the right to health and food can exist only in a context in which social and economic rights as well as civil and political rights are respected.⁴ These underlying conditions form the basis for the right to health, food, and a clean environment which are threatened by the sale and consumption of tobacco. The explosion of global tobacco markets has also led to a greater need for international law and

1. World Conference on Human Rights, June 14–25, 1993, Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc A/CONF.157/23 (July 12, 1993).

2. Mahendra Pratap Singh v. State of Orissa, 1997 A.I.R. 84 (Ori.) 37, 38.

3. See Melissa E. Crow, *Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control*, 29 YALE J. INT'L L. 209, 214 (2004); Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing A Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101 (2005).

4. David Fidler, *International Law and Global Public Health*, 48 U. KAN. L. REV. 1 (1999).

international human rights law to regulate tobacco use and provide a much needed counterweight to the political power and consistent misbehavior of transnational tobacco corporations.⁵

We argue that a derivative human right to tobacco control emerges from the right to life and right to health guarantees, and is especially relevant to the rights of women and children.⁶ Just as a right for women to live free from violence is implied in the affirmation of women's rights as human rights, the right to life and health implies a right to tobacco control and is implicit in the human rights treaties. The creative interpretation of existing human rights norms forms the foundation for this right. Since tobacco use is the largest cause of preventable death in the world, the control of tobacco for the enjoyment of the right to life needs no justification.⁷

Part One of this paper explores how the intersectionalities of the International Covenant on Economic Social and Cultural Rights (ICESCR) 1966,⁸ the Convention on the Rights of the Child (CRC) 1989,⁹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979,¹⁰ and the Framework

5. See Benjamin Mason Meier, *Employing Health Rights for Global Justice: The Promise of Public Health Response to the Insalubrious Ramifications of Globalization*, 39 CORNELL INT'L L.J. 711 (2006) (describing the ways in which globalization reframes health and engages an evolving framework for health rights); David Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079 (1998); Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301 (1992).

6. See also Carolyn Dresser & Stephen Marks, *The Emerging Human Right to Tobacco Control*, 28 HUM. RTS. Q. 599 (2006).

7. The consequences of tobacco were most sharply documented in the 2003 WHO World Health Report:

The consumption of cigarettes and other tobacco products and exposure to tobacco smoke are the world's leading preventable cause of death, responsible for about 5 million deaths a year, mostly in poor countries and poor populations. Latest estimates reveal that, of the nearly 4 million men and 1 million women who died, over 2 million men and 380,000 women were in developing countries.

World Health Org. [WHO], *The World Health Report 2003: Shaping the Future*, at 91, (2003) (citing Majid Ezzati & Alan D. Lopez, *Estimates of Global Mortality Attributable to Smoking in 2000*, 362 THE LANCET 847 (2003)).

8. International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

9. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR 61st plen. mtg., at 167, U.N. Doc A/44/49 (Sept. 2, 1990) [hereinafter CRC].

10. Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], Dec. 18, 1979, 1249 U.N.T.S. 1334 [hereinafter CEDAW] (entered into force

Convention on Tobacco Control (FCTC) 2003¹¹ provide an important new paradigm in supporting tobacco control, and in particular, protecting children's and women's rights against exposure to secondhand smoke.¹² The FCTC has already established that tobacco control is inextricably linked to the CEDAW, CRC, and ICESCR. Framing an issue in terms of rights not only asserts a claim to certain entitlements but is also an affirmation that without those entitlements the promise of unfettered human development remains illusory.

Part Two of this paper uses a gender perspective to make visible the myriad ways in which tobacco undermines the rights of women. A gender analysis is only now beginning to emerge in research on the implications of tobacco for women.¹³ A gender-based human rights analysis sheds new insights into the ways in which the cultivation, production, sale, and consumption of tobacco and exposure to it violate the rights of the most vulnerable populations.¹⁴

Part Three of the paper looks at how human rights norms have been translated into concrete action through innovative strategies of public interest litigation and looks at cause lawyering on tobacco and health as part of a larger social movement.¹⁵ The cases discussed in this part of

Sept. 3, 1981), available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

11. WHO Framework Convention on Tobacco Control (FCTC), *opened for signature* June 16, 2003, WHO Doc A56/VR/4, 42 I.L.M. 518 [hereinafter FCTC] (entered into force Feb. 27, 2005).

12. *Id.* pmbl.

13. See KATHARINE M. ESSON & STEPHEN R. LEEDER, *THE MILLENNIUM DEVELOPMENT GOALS AND TOBACCO CONTROL: AN OPPORTUNITY FOR GLOBAL PARTNERSHIP* (2004); AMERICAN CANCER SOCIETY, *TOBACCO CONTROL COUNTRY PROFILES* (O. Shafey et al. eds., 2d ed. 2003); WOMEN AND THE TOBACCO EPIDEMIC: CHALLENGES FOR THE 21ST CENTURY (Jonathan M. Samet & Soon-Young Yoon, eds., 2001); JUDITH MACKAY & MICHAEL ERIKSEN, *THE TOBACCO ATLAS* (2002); Robin Appleberry, *Breaking the Camel's Back: Bringing Women's Human Rights to Bear on Tobacco Control*, 13 YALE J.L. & FEMINISM 71 (2001).

14. The Preamble to the FCTC specifically acknowledges this concern, noting that tobacco adversely impacts children, women, young girls, and indigenous people:

[T]here is clear scientific evidence that prenatal exposure to tobacco smoke causes adverse health and developmental conditions for children, *deeply concerned* about the escalation in smoking and other forms of tobacco consumption by children and adolescents worldwide, particularly smoking at increasingly early ages, *alarmed* by the increase in smoking and other forms of tobacco consumption by women and young girls worldwide and keeping in mind the need for full participation of women at all levels of policy-making and implementation and the need for gender-specific tobacco control strategies, *deeply concerned* about the high levels of smoking and other forms of tobacco consumption by indigenous people.

FCTC, *supra* note 11, pmbl.

15. Cause lawyering is referred to as lawyers work that is directed at altering some

the paper are not all directly related to tobacco control, but open up new possibilities for tobacco control lawyers and advocates to think creatively about challenging the multiple ways in which tobacco threatens fundamental rights. Litigation, or the threat of litigation, may greatly enhance the bargaining power of the parties affected, help define the budgetary priorities of a state, and be a powerful process for community mobilization. Because the rights discourse is fundamentally a blueprint for empowerment, the rhetoric of rights has spurred many contemporary social movements and spawned alternative political action.¹⁶ Most importantly, locating tobacco control within the human rights discourse helps to frame the issue in a way that is morally compelling and politically urgent.¹⁷

I. DEFINING AND DEVELOPING A RIGHTS-BASED APPROACH TO TOBACCO CONTROL

*The adoption of a human rights-based approach . . . will greatly facilitate implementation of the right to health.*¹⁸

Human rights connote the equal dignity of human beings¹⁹ and form the normative basis for the universal and inalienable right to health.

aspect of the social, economic and political status quo. This formulation, as Sarat and Scheingold emphasize, is by no means a rigid definition; it is understood to embrace the work of lawyers who affiliate themselves with social movements as well as the work of lawyers who struggle on in the service of a program of social change even when no movement exists. Stephen Ellman, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 349 (Austin Sarat & Stuart Scheingold eds., 1998).

16. See generally Robin Appleberry, "It's a Woman Thing": *Sex, Status, and Human Rights in the Tobacco Epidemic*, 15 *BERKELEY WOMEN'S L.J.* 312 (2000). Appleberry argues that tobacco control is inextricably connected to human rights and must be located as a critical women's rights issue. *Id.* Relying on evidence of tobacco's devastating effect on women's mental, physical, and social health, she contends that the intersection of sex, status, and power has placed the world's most vulnerable women in a position of unique and intolerable risk. *Id.* She argues that this crisis should be challenged on the grounds that it is a violation of women's fundamental human rights and that a feminist approach to tobacco control can help to address the root causes of the tobacco epidemic. *Id.*

17. Appleberry, *supra* note 13, at 72.

18. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health* (Art. 12 of the *Int'l Covenant on Economic, Social and Cultural Rights*), ¶ 64, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *ECOSOC General Comment 14*].

19. Article 1 of the Universal Declaration of Human Rights states, "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights art. 1,

Founded upon the non-derogable right to life, these norms are premised upon the obligations of States to fulfill certain rights as duty bearers.²⁰ Health as a human right gained currency in the 1980s when the HIV/AIDS crisis brought to the forefront the synergistic connection between health and human rights.²¹ The World Health Organization (WHO) has acknowledged that a human rights approach to HIV/AIDS is key to AIDS prevention and care and has urged governments to promote a human rights model of AIDS care and prevention.²² This human rights approach to health might also be applied to tobacco control. As smoking prevalence drops in the United States, the tobacco industry is seeking new markets and targeting Asian countries and other developing countries where knowledge about the harm of tobacco has still not crystallized; as a result, the need for a human rights-based approach to address tobacco is all the more relevant and immediate.²³

G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

20. Benjamin Mason Meier, *Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health*, 5 YALE J. HEALTH POL'Y L. & ETHICS 137 (2005).

21. See generally, Jonathan M. Mann, *Human Rights and AIDS: The Future of the Pandemic*, 30 J. MARSHALL L. REV. 195, 195-206 (1996). Dr. Mann made the groundbreaking argument that general principles of international human rights law should guide governments in their responses to HIV and AIDS. *Id.* His article reflected a seminal global vision that the only appropriate responses to HIV and AIDS pandemic would link human rights to public health. *Id.* at 204. See also Mark E. Wojcik, *On the Sudden Loss of Human Rights Activist: A Tribute to Dr. Jonathan Mann's Use of International Human Rights Law in the Global Battle Against AIDS*, 32 J. MARSHALL L. REV. 129, 129-39 (1998); Daniel Tarantola, *Building on the Synergy between Health and Human Rights: A Global Perspective* (François-Xavier Bagnoud Center for Health and Human Rights, Working Paper No. 8, 2000), available at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP8--Tarantola.pdf.

22. See Sofia Gruskin & David Tarantola, *Health and Human Rights* (François-Xavier Bagnoud Center for Health and Human Rights, Working Paper No. 10, 2000), available at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP10--Gruskin_and_Tarantola.pdf.

23. See John Schwartz & John Pomfret, *Smoking-Related Deaths in China are Up Sharply*, WASH. POST, Nov. 20, 1998, at A1 ("Chinese consumption has jumped—from 100 billion cigarettes a year in the early 1950s to 500 billion in 1980 and 1.8 trillion today. Average daily consumption rose from one per Chinese man in 1952 to four in 1972 and 10 in 1992"). Tobacco companies are rapidly turning the developing world into primary markets. See WORLD BANK, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL 1-20 (1999) "By 2020, seven out of every ten people killed by smoking will be in low- and middle-income nations." *Id.* at 1. China, India, and Southeast Asia will be among the worst affected regions. *Id.* at 25. China's current one million tobacco attributable deaths per year, the highest in the world, could rise to two million by the year 2025. Bo-Qi Liu et al., *Emerging Tobacco Hazards in China: 1. Retrospective Proportional Mortality Study of One Million Deaths*, 317 BRIT. MED. J. 1411, 1421 (1998) (citing and confirming several of the predictions made by British epidemiologist Richard Peto in the late-1980s).

The human rights-based approach gains powerful resonance in dealing with vulnerable populations such as women and children.²⁴ Reconceptualizing tobacco control in the language of rights places at the center of tobacco control the principles of nondiscrimination and equality, participation and inclusion, and accountability and the rule of law. In a human rights-based approach, States and other duty bearers are held accountable for fulfilling and guaranteeing the rights of the people.²⁵ Strengthening the capabilities of rights holders to make their claims and of duty bearers to meet their obligations is what a human rights-based approach to tobacco control is about.²⁶

The interdependence and the interrelatedness of human rights have special relevance to tobacco control. Reading the Framework Convention on Tobacco Control (FCTC)²⁷ in the context of the

24. See, e.g., Jeff Collin et al., *The Framework Convention on Tobacco Control: The Politics of Global Health Governance*, 23(2) *THIRD WORLD QUARTERLY* 265, 273 (2002) ("Trade liberalisation [sic] has led to increased consumption of tobacco, but while it has no substantive effect on higher income countries, it has a large and significant impact on smoking in low-income countries and a significant, if smaller, impact on middle-income countries.").

25. United Nations Population Fund, *The Human Rights-Based Approach*, <http://www.unfpa.org/rights/approaches.htm> (last visited Oct. 14, 2008):

Before 1997, most UN development agencies pursued a "basic needs" approach: They identified basic requirements of beneficiaries and either supported initiatives to improve service delivery or advocated for their fulfillment.

UNFPA and its UN partners now work to fulfill the rights of people, rather than the needs of beneficiaries. There is a critical distinction: A *need* not fulfilled leads to dissatisfaction. In contrast, a *right* that is not respected leads to a violation, and its redress or reparation can be legally and legitimately claimed. A human rights-based approach to programming differs from the basic needs approach in that it recognizes the existence of rights. It also reinforces capacities of duty bearers (usually governments) to respect, protect and guarantee these rights.

26. ECOSOC *General Comment 14*, *supra* note 18, ¶ 59:

Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.

27. On May 21, 2003, the World Health Organization (WHO) enacted and adopted the Framework Convention on Tobacco Control (FCTC), the first global public health treaty. The treaty has 168 signatories and 150 parties, including the European Community, making it one of the most widely embraced of all UN Treaties. The FCTC has provided States with an international standard setting document in the field of health policy. The FCTC provides a strong global impetus to combat efforts of transnational tobacco corporations. NGOs will find the FCTC pivotal to their advocacy on tobacco control. See FCTC, *supra* note 11, foreword.

Convention on the Rights of the Child (CRC),²⁸ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁰ enables a more holistic approach to tobacco control that takes into account the fact that the way in which the tobacco industry markets its harmful products and the dangers of exposure to secondhand smoke erode a wide range of rights of women and children, including equality, health, food, and reproductive rights. The actualization of one right often depends upon the concurrent realization of a plethora of other rights. For instance, the right to health may depend on the prior realization of the right to education and the right to information.³¹

Developing a rights-based approach to tobacco control involves upholding both individual health rights and the collective rights of the public.³² Traditionally, states were called upon to refrain from violating the rights of people.³³ Known as first generation rights, these pertained to civil and political rights.³⁴ Increased interdependence of rights and the unity between rights regimes demands a more layered set of rights including rights which call for states to create conditions favorable to the protection of the right.³⁵ States are now called upon to go beyond refraining from doing harm to taking concrete action to guarantee the economic, social, and cultural rights of claim holders.³⁶ This expansive notion of rights and the recognition of the way in which tobacco affects health rights provide a powerful frame of reference to hold states

28. See CRC, *supra* note 9.

29. CEDAW, *supra* note 10.

30. ICESCR, *supra* note 8.

31. For example, Article 27 of the CRC provides for the "right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." CRC, *supra* note 9, art. 27. To meet this requirement, policies must be institutionalized to ensure that caregivers do not smoke in the presence of children and do not spend money on tobacco at the cost of an adequate standard of living for their children. Additionally, education and information is key to preventing the initiation of smoking by children and teenagers.

32. See generally, Meier & Mori, *supra* note 3.

33. G.J.H. Van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, in *THE RIGHT TO FOOD* 97, 106 (P. Alston & K. Tomaševski eds., 1984).

34. See Meier, *supra* note 5.

35. *Id.*

36. See generally Meier & Mori, *supra* note 3.

responsible to take affirmative steps to prevent smoking and the exposure to secondhand smoke. A framework of human rights which builds on many layers of obligations allows for an integrated approach to human rights. Just as much as the right to food encompasses the duty on the part of the government to develop training programs to improve the means of production,³⁷ the right to health calls for governments to control the production, sale, and manufacture of tobacco.

The core elements of the right to health presuppose that state and non-state parties refrain from violating the right to health by banning smoking in public places, and that States Parties take positive action to intervene to protect people from the ruthless marketing tactics of tobacco corporations. Thus even when the state is not directly responsible for the wrongdoings of tobacco companies, under the doctrine of due diligence,³⁸ states can be held liable for inaction or failure to take sufficient precautions to safeguard human rights.

A human rights-based approach becomes acutely relevant in countering discriminatory practices of the tobacco industry. Marketing strategies targeting vulnerable groups—including women and children—have flooded the developing world,³⁹ especially in Asia, giving rise to concerns of discrimination and exploitation.⁴⁰ Targeting youth and women, especially those from minority ethnic groups, as consumers of tobacco is not only a violation of their health rights, but

37. *Id.* at 283.

38. See Crow, *supra* note 3, at 223–24.

39. In Vietnam, the tobacco industry has a tradition of sponsoring cricket matches and tennis games. In Sri Lanka, women are lured to smoke at dance clubs. See Garrett Mehl, Remarks at U.N. Comm. on the Status of Women, 43rd Sess. at 26–30 (Mar. 2, 1999), available at http://www.gawh.org/programs/03_02_99/pdf/smoking.pdf.

40. See Jonathan Wike, *The Marlboro Man in Asia: U.S. Tobacco and Human Rights*, 29 VAND. J. TRANSNAT'L L. 329, 329–61 (1996) (examining how the tobacco industry responded to declining domestic consumption by redoubling its efforts to market tobacco in Asia and other foreign markets resulting in increased tobacco use and health risks in Asia). See also Gro Harlem Brundtland, *Foreword*, in THE TOBACCO ATLAS 9–10 (2002). Dr. Gro Harlem Brundtland, the former Director General of WHO, states, “Girls and women are being targeted all over the world by expensive and seductive images of freedom, emancipation, slimness, glamour and wealth.” *Id.* at 9. See also Tamsyn Seimon & Garrett L. Mehl, *Strategic Marketing of Cigarettes to Young People in Sri Lanka: “Go Ahead—I Want to See You Smoke it Now,”* 7 TOBACCO CONTROL 429, 429–33 (1998). Carolyn Dresser and Stephen Marks argue that the tobacco industry is aware that its future lies with women. See generally Dresser & Marks, *supra* note 6.

raises the issue of discrimination based on age, gender, race, and ethnicity.⁴¹

Second, rights-based approaches emphasize the accountability of duty bearers who are both state and non-state actors, and provide legal remedies to claim holders. When duty bearers fail to comply with human rights instruments, aggrieved rights holders are entitled to remedies before a court or other adjudicator. The justiciability⁴² of rights affords powerful redress mechanisms to protect women and children from secondhand smoke and the marketing practices of tobacco companies.⁴³ Given that rights must be located within an overlapping, interconnected framework, women's right to equality is dependant and predicated upon women's right to information. This latter right is often breached by advertisement and marketing practices that take place in the absence of information on women's health and smoking that can help balance the misstatements and irrational associations generated by tobacco advertisements.⁴⁴

Third, not only are human rights conventions and the FCTC mutually reinforcing and complementary, but human rights norms also fill in the gaps of the FCTC.⁴⁵ Since the FCTC implementation and reporting

41. In Sri Lanka, where only one percent of women smoke, newspapers report that the tobacco industry hired young women to drive Jeeps and smoke Players cigarettes. See Mehl, *supra* note 39.

42. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS & WHO, FACT SHEET NO. 31: THE RIGHT TO HEALTH (June 2008), available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

43. "Involuntary smoking can cause lung cancer in nonsmokers." U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL 3 (1986). Second Hand Smoke (SHS) or Environmental Tobacco Smoke (ETS) includes both the smoke exhaled by the smoker as well as the stream of smoke coming directly from the tip of a burning cigarette. *Id.* at 1. According to a 1982 report by the U.S. Surgeon General on the health consequences of smoking, "sidestream smoke . . . from an idling cigarette may contain 50 times more of some potent carcinogens . . . than the mainstream smoke that smokers willingly draw into their lungs." Peter P. Morgan, *Time for Action on Passive Smoking*, 127 CANADIAN MED. ASS'N J. 810, 810 (1982). Children are most vulnerable to secondhand smoke—which has been established as a cause of disease and death to fetuses, infants, and children. See William F. Chinnock, *No Smoking Around Children: The Family Courts' Mandatory Duty to Restrain Parents and Other Persons from Smoking Around Children*, 45 ARIZ. L. REV. 801, 809 n.53 (2003) (providing a collection of several sources on the deleterious effects of secondhand smoke on fetuses, infants, and children).

44. "The right to information has a measurable impact on the realization of the right to tobacco control." See Dresser & Marks, *supra* note 6, at 631.

45. These gaps may at some time in the future be filled by the FCTC's Conference of the Parties which, in fulfilling its oversight role for the Convention, "shall keep under regular

mechanisms are still weak, the well-established implementation machinery of the human rights treaties can be utilized to supplement the FCTC's nascent implementation and reporting mechanisms. These resources could be used creatively to hold governments accountable to the promotion of global tobacco control. Also, these other treaty bodies can be used to address tobacco-related human rights violations by governments that have yet to ratify the FCTC, such as Indonesia and the United States.

The now-established indivisibility of rights⁴⁶ affords an important channel through which the right to health can be linked with the right to life. The right to life and health has been established as a cornerstone of customary international law. Thus, linking the right to be free of secondhand smoke to the right to life elevates the right to be free of secondhand smoke to a customary human rights norm or a peremptory norm: these norms are considered non-derogable and therefore impose binding obligations on countries that have not ratified certain treaties.⁴⁷

Another advantage of the rights-based approach is that it anchors tobacco control, especially the threat of secondhand smoke, in human rights treaties that have had a long and enduring history of protecting the fundamental rights of women and children.

Finally, the human rights framework has galvanized powerful movements on women's and children's rights which can be cross-fertilized with the tobacco control movement for greater impact to challenge tobacco consumption, secondhand smoke exposure, and the unethical marketing of tobacco.⁴⁸ Using the human rights framework can revitalize tobacco control and provide broader mechanisms to

review the implementation . . . and may adopt protocols, annexes and amendments to the Convention . . ." FCTC, *supra* note 11, art. 23.

46. World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, ¶ 18, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter Vienna Declaration];

The human rights of women and the girl child are an inalienable, integral, and indivisible part of human rights. The full and equal participation of women in political, civil, economic, social, and cultural life at the national, regional, and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

47. See generally Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for our Nation and World?*, 34 IND. L. REV. 1457 (2001).

48. See generally, Neil Stammers, *Social Movements, Human Rights, and the Challenge to Power*, 97 AM. SOC'Y INT'L L. PROC. 299; BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 216-17 (2003).

prevent and control tobacco. Moreover, a human rights approach would bring together a broader alliance of civil society organizations—including ones working on women's rights, reproductive rights, children's rights, consumer rights, environmental protection, poverty rights, employment rights, and health rights, as well as those engaged in examining the consequences of globalization—to engage in combating tobacco.⁴⁹

Not only is the rights discourse a powerful tool to challenge stereotypes and discriminatory traditions, but the international human rights framework can be a powerful catalyst to mobilize national and grassroots organizations. Its capacity extends beyond its usefulness in informing legislation to providing accountability for violations of law and rights, providing benchmarks to monitor the fulfillment of rights, and as an organizing tool to mobilize and galvanize communities into taking action. As Amartya Sen argues: "The implementation of human rights can go well beyond legislation For example, public recognition and agitation (including the monitoring of violations) can be part of the obligations."⁵⁰

Thus the human rights framework could help push the boundaries of tobacco control and broaden access to a wider group than traditional tobacco control advocates. This could also help forge alliances with different government agencies and build interagency task forces on tobacco control. The strategic use of human rights rhetoric can both redefine and revitalize the tobacco control movement and help link it with alternative social movements that have a long tradition of affecting positive change. Human rights scholars argue that social movements are critical interlocutors of socio-legal change, and the ways in which certain social movements have engaged international corporations and state institutions to push them toward meaningful accountability can be

49. See Richard Falk, *Interpreting the Interaction of Global Markets and Human Rights*, in GLOBALIZATION AND HUMAN RIGHTS 61, 63 (Alison Brysk ed., 2002) ("globalization-from-below activists are becoming more committed to a different, broader idea of human rights, which directly challenges globalization-from-above"); Richard Falk, *The Making of Global Citizenship*, in GLOBAL VISIONS: BEYOND THE NEW WORLD ORDER 39 (Jeremy Brecher, et al. eds., 1993); RAJAGOPAL, *supra* note 48.

50. Amartya Sen, *Elements of a Theory on Human Rights*, 32 PHILOSOPHY AND PUBLIC AFFAIRS 4, 319 (2004). "[T]he global NGO's have been involved in advancing human rights through public discussion and support, on the one hand, and publicizing and criticizing on the other." *Id.* at 344.

a lesson for tobacco control advocates.⁵¹ As Dr. Brundtland has cogently argued: “We need a broad alliance against tobacco, calling on a wide range of partners such as women’s organizations to halt the relentless increase in global tobacco consumption among women.”⁵² Linking tobacco control initiatives with grassroots women’s movements around the world will increase the power of the tobacco control movement as well as the potential of the women’s movements to address gender-based policies and programs on tobacco control.

A. Identifying the Relevant Human Rights Instruments to Challenge Tobacco

In order to analyze the ways in which tobacco sale and consumption erodes human rights guarantees, we will first examine the human rights treaties applicable to tobacco control. The right to health is enshrined in several human rights documents. The U.N. Charter, the foundational document of the United Nations, is a bill of rights which seeks solutions to “international economic, social, health, and related problems.”⁵³ The Universal Declaration of Human Rights recognizes the right to a standard of living adequate for the health and well-being of a person.⁵⁴ The International Covenant on Economic, Social and Cultural Rights (ICESCR), a cornerstone of the International Bill of Human Rights, specifically promotes the right to health.⁵⁵ Article 12 affirms that “[s]tate parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁵⁶ The provision also establishes a range of obligations including prenatal, postnatal, and child health care; environmental and

51. See RAJAGOPAL, *supra* note 48.

52. See Judith Mackay, *Preface to WOMEN AND THE TOBACCO EPIDEMIC, CHALLENGES FOR THE 21ST CENTURY*, at vi-vii (Jonathan M. Samet & Soon-Young Yoon eds., 2001), available at <http://www.who.int/tobacco/media/en/WomenMonograph.pdf>.

53. U.N. CHARTER arts. 55, 56.

54. Article 3 of the Universal Declaration of Human Rights enshrines the right to life and Article 25 the right to health. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). The UDHR rights are the foundational rights and form the nucleus of the human rights conventions. Although the UDHR is not binding, these rights are peremptory rights, or rights that are non-derogable. Similarly, even when countries have not ratified the CEDAW, CRC, or ICESCR, these customary human rights are binding by virtue of their fundamental nature.

55. ICESCR, *supra* note 8.

56. *Id.* art. 12.

industrial hygiene; control of epidemics; and medical care for acute illnesses. Exposure to secondhand smoke is addressed directly in Article 12 (b) of the ICESCR which calls for "[t]he improvement of all aspects of environmental and industrial hygiene."⁵⁷

The Committee on Economic, Social, and Cultural Rights (CESCR) has noted that Article 12.2(b) "discourages . . . the use of tobacco."⁵⁸ According to the text of *General Comment 14*, the right to health codified in Article 12 of the ICESCR extends not only to timely and appropriate health care, but also to the underlying determinants of health—such as access to safe and potable water and adequate sanitation; an adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information, including information on sexual and reproductive health.⁵⁹ Applying *General Comment 14*, the Committee has elaborated specific entitlements to several underlying determinants of the right to health including "preventive, curative and rehabilitative health services."⁶⁰

General Comment 14 also observes that "States parties are bound by both the collective and individual dimensions of Article 12."⁶¹ Collective rights are an important nexus between the individual right to health and disease prevention and health promotion.⁶² Additionally, a State's failure to take all necessary measures to safeguard persons within its jurisdiction from infringements of the right to health by third parties, including corporations, constitutes a violation of its Article 12 obligations. Specific examples of such violations include "the failure to discourage production, marketing and consumption of tobacco."⁶³ *General Comment 14* also recommends the "prevention and reduction of the population's exposure to harmful substances such as . . . harmful chemicals or other detrimental environmental conditions that directly or

57. *Id.* art. 12(b).

58. ECOSOC *General Comment 14*, *supra* note 18, ¶ 15.

59. *Id.* ¶ 11. The Committee on Economic, Social, and Cultural Rights (CESCR), the monitoring and interpreting body for the ICESCR, has specified that Article 12.2's requirements are included only by way of illustration and are not intended to be an exhaustive list of state obligations. *Id.* ¶ 7.

60. *Id.* ¶ 17.

61. *Id.* ¶ 27.

62. *Id.*

63. *Id.* ¶ 51.

indirectly impact upon human health.”⁶⁴ Moreover, *General Comment 14* requires the establishment of prevention and education programs for behavior-related health concerns. As the Committee explains in *General Comment 14*, “[t]he right to health, like all human rights, imposes three types or levels of obligations on States Parties: the obligation to respect, protect and fulfill.”⁶⁵ These obligations require States Parties “to take measures that prevent third parties from interfering with Article 12 guarantees” and “to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realization of the right to health.”⁶⁶

The U.N. Committee on the Rights of the Child has also made general recommendations regarding the need for more effective tobacco information campaigns and the importance of tobacco advertising restrictions. For example, the Committee in *General Comment No. 4* (2003) emphasized the obligation of the States Parties to promote cost-effective measures, including through laws, policies, and programs, with regard to the abuse of alcohol, tobacco, and other harmful substances.⁶⁷

The core elements of the right to health and tobacco control thus require that state and non-state parties refrain from violating the right to health of citizens by banning smoking in public places—as well as affirmative action to intervene to the maximum extent of its available resources to protect people from the ruthless marketing tactics of tobacco corporations.

The International Covenant on Civil and Political Rights (ICCPR) guarantees many rights, such as the right to life and the right to information, which have a direct bearing on tobacco control.⁶⁸ Linking

64. *Id.* ¶ 15.

65. *Id.* ¶ 33.

66. *Id.*

67. U.N. Convention on the Rights of the Child [CRC], Comm. on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, ¶ 10, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter *General Comment No. 4*].

68. International Covenant on Civil and Political Rights [ICCPR], G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., arts. 6, 19, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] (entered into force Mar. 23, 1976): Article 6 of the ICCPR protects the inherent right to life and imposes a duty on the state to take positive measures to ensure the right to life, including steps to reduce infant mortality rates, prevent industrial accidents, and protect the environment. Article 19(2) of the ICCPR protects the freedom to seek, receive, and impart information and ideas of all kinds. But Article 19(3)(b) provides that the exercise of this right can be restricted for the protection of national security or public order or of public health; thus,

human rights to tobacco control allows the limitation of free speech for the greater public good.⁶⁹ An examination of this limitation to the right to free speech has relevance and urgency in the face of the tobacco industry's manipulation of the right to free speech to justify their continued recruitment of new nicotine addicts. In the actual marketplace—as opposed to the notional “marketplace of ideas”—the disinformation expressed and implied in tobacco industry marketing has had a near-monopoly for a long time. The severe imbalance in the marketplace between tobacco industry disinformation and accurate information on the health effects of tobacco use has affected all but the most scientifically sophisticated consumers, and especially children and others who are least able to resist the covert appeals and associations made in the marketing, advertising, and sale of tobacco. Thus, the tobacco company argument that its advertising should not be controlled based on free speech cannot cover children and other vulnerable people who are unable to process the information available in the marketplace in a manner consistent with their interests and right to protect their own health. They, therefore, have a right to be protected by restricting the speech rights of those peddling harmful products and treaty provisions limiting speech in situations of great risk to life and health are applicable.⁷⁰

In challenging the tobacco industry's economic analysis that smoking enhances employment and livelihood opportunities consistent with the right to employment, it is important to examine the costs of loss of productivity due to health care spending and higher mortality rates. A World Bank study argues that “[t]obacco production is a small part of most economies and for all but a very few agrarian countries heavily dependent on tobacco farming, there would be no net loss of jobs, and there might even be job gains if global tobacco consumption fell.”⁷¹

it does not provide a carte blanche for tobacco industry advertising campaigns. The right to be properly informed is subsumed in the Right to Speech and Information: Adequate information includes being aware that specific diseases are caused by smoking and accurately appreciating the meaning, severity, and probabilities of developing tobacco related diseases.

69. Article 4 of the ICCPR allows rights to be limited for the greater public good. Thus, the right to free speech arguments that tobacco companies often use to legitimize unfettered tobacco advertising can be met with Article 4 of the ICCPR which justifies the reining in of rights when required by morality, public order, or the general welfare. *Id.* art. 4.

70. Kathleen J. Lester, *Cowboys, Camels, and Commercial Speech: Is the Tobacco Industry's Commodification of Childhood Protected by the First Amendment*, 24 N. KY. L. REV. 615 (1997).

71. Chang-fa Lo, *Establishing Global Governance in the Implementation of FCTC*:

The impact of direct smoking and secondhand smoke on the health of children and on maternal health can be addressed by the Convention on the Rights of the Child (CRC).⁷² The CRC is the most widely ratified Convention in the world and offers a broad scope of protection for children. The CRC states that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”⁷³ Given the uncontested evidence that smoking adversely affects a child’s health, natural biological functioning, and anticipated lifespan, it therefore impacts the child’s “inherent right to life.”⁷⁴ As a result, states have an obligation to prevent children’s access to tobacco and minimize children’s exposure to tobacco in order to “ensure to the maximum extent possible the survival and development of the child.”⁷⁵

Article 13 of the CRC focuses on the child’s freedom of expression and receipt of “information and ideas of all kinds,” including commercial speech regarding legal products; in light of the fact that minors are viewed “as incapable of exercising full autonomy of choice,” unrestricted information may be curtailed in the child’s best interests.⁷⁶ This again rebuts the tobacco industry’s claim of the unfettered right of freedom of speech and expression. Article 24(2)(d) of the CRC also recommends “appropriate pre-natal and post-natal health care for expectant mothers,” which must be read together with Article 12 of the CEDAW on women’s health rights.⁷⁷

Some Reflections on the Current Two-Pillar and One-Roof Framework, 1 ASIAN JOURNAL OF WTO AND INT’L HEALTH LAW AND POLICY 569 (2006) (article was originally written for the International Conference on Global Governance & Partnership under the Framework Convention on Tobacco Control (FCTC), which was held by the College of Law and the College of Public Health of the National Taiwan University and the Department of Health, ROC on November 28, 2005). See also WORLD BANK, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL (1999), available at http://www1.worldbank.org/tobacco/reports_pdf.asp.

72. CRC, *supra* note 9.

73. *Id.* art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

74. *Id.* art. 6(1).

75. *Id.* art. 6(2). Article 24 “recognize[s] the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.” *Id.* art. 24(1).

76. *Id.* art. 13(2) (stating that the right to information “may be subject to certain restrictions,” including “public health or morals”).

77. CEDAW, *supra* note 10, art. 12:

1. States Parties shall take all appropriate measures to eliminate discrimination

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), also known as the Women's Bill of Rights, can be used to hold the State and tobacco industry accountable for women's rights violations.⁷⁸ According to Article 12 of the CEDAW, referred to above, "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care."⁷⁹ The Article also specifically refers to the right to adequate nutrition and care during the postnatal period. Not only is secondhand smoke a threat to both pre- and postnatal health, but often nutrition needs of both women and children are sacrificed at the altar of tobacco consumption.⁸⁰ Cigarette consumption, often by the male members of the family, competes with the purchase of essential food, medicine, and education for children. Thus, smoking is a direct threat to the children's and women's right to food, health care, and education. Building on the goal of eliminating discrimination in all its forms, the CEDAW shatters the artificial distinction between the public and the private realms and has the unique capacity to address risks and impediments to women's health, both within the private sphere of the home and public spaces such as work or school.⁸¹

In April 2007, the Convention on the Rights of Persons with Disabilities (CRPD)⁸² came into operation and recognized that disability is a human rights issue. This provides yet another tool in our arsenal of strategies to combat tobacco. Furthermore, the CRPD recognizes the

against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

78. *Id.* art. 12(1).

79. Article 12 of the CEDAW also provides women the equal right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction. *Id.* art. 12.

80. People buy cigarettes instead of buying food for their children. PATHCANADA AND WORK FOR A BETTER BANGLADESH, FACT SHEET: TOBACCO AND POVERTY, available at http://wbb.globalink.org/public/poverty_factsheet.pdf.

81. In Article 2(e), the CEDAW recommends that state parties "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise." CEDAW, *supra* note 10, art. 2(e). This is the first time a human rights convention has held private parties accountable under the Convention.

82. Convention on the Rights of Persons with Disabilities [CRPD], G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

multiple forms of discrimination faced by women with disabilities⁸³ and children with disabilities,⁸⁴ and in separate articles guarantees women and children full and equal enjoyment of all human rights and fundamental freedoms.

As universally agreed upon frameworks, these human rights treaties provide a universal benchmark and standard-setting guide for law reform, litigation, and advocacy. These human rights treaties are also important indicators of change and provide a barometer by which to measure progress by States Parties.

B. States' Duty to Protect Against Corporate Abuse

While treaties were traditionally concerned with State Parties' duty to guarantee the enjoyment of rights, the emergence of state duties to regulate non-state actors and private enterprises has emerged as one of the most important characteristics of the current human rights discourse.⁸⁵

The duty of States to hold non-state actors accountable to rights' violations and treaty obligations in the areas of health, women's rights, minority rights, and rights of persons with disabilities has come to the

83. *Id.* art 6 (Women with Disabilities):

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

84. *Id.* art. 7 (Children with Disabilities):

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

85. The state is no longer the only target of international legal obligation, and states face increasing pressure to regulate the behavior of non-state actors. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2002).

fore in this era of globalization and transnational corporations.⁸⁶ The emerging duty to protect against corporate abuse is gaining currency and needs to be examined in relation to tobacco control.⁸⁷ While globalization has had many positive effects,⁸⁸ the globalization of tobacco has only negative and dangerous consequences on global health and well-being. In no other country is this seen as starkly as in China where new markets for foreign tobacco companies and new battlegrounds on tobacco control have arisen. The United States' pressure on China to live up to its human rights obligations on the one hand, and on the other, the unfettered license given to U.S. tobacco industries to export death to China and other countries has created a cognitive dissonance. According to recent studies, tobacco-related illnesses will claim three million Chinese lives a year by the middle of

86. See, e.g., Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 44/25, U.N. Doc. A/RES/54/263 (May 25, 2000); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Annex, Supp. No. 49A, at 262, U.N. Doc. A/45/49 (Dec. 18, 1990).

87. As deaths from smoking-related diseases skyrocket in developing countries, there is a greater need for private industry to be held accountable:

[S]ince 1970, in developing countries [lung cancer] has risen by sixty-seven percent. Globally, lung cancer is skyrocketing, and ninety percent of this increase is attributable to cigarette smoking. In a developing country like India, for example, where deaths would be expected to result from infectious diseases, the World Health Organization (WHO) estimated that 800,000 deaths would result in 1990 from tobacco use. In 1990, the WHO gauged that the number of deaths per year in the world due to smoking had reached three million, the equivalent of eight thousand deaths per day. The WHO expects this figure to at least triple by the time today's teenage smokers reach middle age. By the year 2025, ten million people are expected to die each year from tobacco use. Seven million of these deaths will occur in developing countries, with two million deaths per year in China alone.

Heidi S. Gruner, *The Export of U.S. Tobacco Products to Developing Countries and Previously Closed Markets*, 28 LAW & POL'Y INT'L BUS. 217 (1996).

88. The rise of markets in China, the fall of the Soviet Union, and the opening up of markets in a wide range of other countries—including countries in transition from socialism to market economies and countries in transition from controlled, protected markets to more "efficient" market economies—has spawned a globalization of markets unprecedented in human history. For a discussion of changes in the law and the development of emerging markets, see David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1 (1972); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974); THOMAS CAROTHERS AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999); and William P. Alford, *Exporting the Pursuit of Happiness*, 113 HARV. L. REV. 1677 (2000).

the twenty-first century.⁸⁹ Another report predicts that smoking will cause the premature death of more than fifty million people currently living in China.⁹⁰ Not only has the age of first-time users dropped, Chinese women are the newest victims of tobacco consumption.⁹¹ As Rene Scull, then a vice-president of Phillip Morris Asia, stated in 1985: "No discussion of the tobacco industry in the year 2000 would be complete without addressing what may be the most important feature on the landscape, the Chinese market. In every respect, China confounds the imagination."⁹² The Chicago Tribune has alleged that the United States has helped to "plant time bombs of illness and death."⁹³ Others have drawn analogies with the U.S. tobacco global markets to the dumping of nuclear waste.⁹⁴

Recognizing the need for greater corporate responsibility, the United Nations established the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms) in 2003.⁹⁵ Traditionally, States were required to play a pivotal role in effectively regulating and holding accountable corporate activities with regard to human rights. However, the Norms reveal a marked shift towards more pressure on States to hold corporate actors accountable for rights violations. Although the Norms emphasize that governments bear the primary responsibility for the protection of human rights, the Norms also impose obligations on transnational corporations and other business enterprises to protect norms recognized in national and international law.⁹⁶

89. See Schwartz, *supra* note 24.

90. See Katherine Arms, *Millions Lighting Up Despite Warnings, Officials See Taxes as Best Deterrent*, WASHINGTON TIMES, Nov. 8, 1999, at A15.

91. See generally Matt Parker, *Blowing Smoke? A Reappraisal of U.S. Tobacco Policy in China*, 21 U. PA. J. INT'L ECON. L. 211 (2000).

92. *Id.* (quoting Stan Sesser, *Opium War Redux*, NEW YORKER, Sept. 13, 1993, at 78-79).

93. Joan Beck, *Using U.S. Trade Policies to Push Illness and Death*, CHI. TRIB., Nov. 16, 1997, at C21.

94. Parker, *supra* note 91, at 222.

95. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Norms on Responsibilities of Transnat'l Corps.].

96. *Id.* art. 13:

Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market,

The most relevant section of the Norms for tobacco control is Article 13, which addresses the obligations of businesses regarding consumer protection. It states categorically that corporations may not “produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.”⁹⁷ Although a literal reading of these Norms would suggest that compliance with them would render the sale of cigarettes inconsistent with the Norms, at a minimum, the Norms require the tobacco industry to stop targeting children and other vulnerable groups.

or advertise harmful or potentially harmful products for use by consumers.

See also Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, art. 13 cmts. [hereinafter Commentary on Norms], available at <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html>:

(b) Transnational corporations and other business enterprises shall observe relevant international standards for the protection of consumers Transnational corporations and other business enterprises shall ensure that all marketing claims are independently verifiable, satisfy reasonable and relevant legal levels of truthfulness, and are not misleading. Further, they shall not target children when advertising potentially harmful products.

(c) Transnational corporations and other business enterprises shall ensure that all goods and services they produce, distribute, or market are . . . safe for intended and reasonably foreseeable uses, do not endanger the life or health of customers, and are regularly monitored and tested to ensure compliance with these standards, in the context of reasonable usage and custom. They shall adhere to relevant international standards so as to avoid variations in the quality of products that would have detrimental effects on consumers, especially in States lacking specific regulations on product quality.

(e) Where a product is potentially harmful to the consumer, transnational corporations and other business enterprises shall disclose all appropriate information on the content and possible hazardous effects of the products they produce through proper labeling, informative and accurate advertising and other appropriate methods. In particular, they shall warn if death or serious injury is probable from a defect, use, or misuse. Transnational corporations and other business enterprises shall supply appropriate information of potentially harmful products to the relevant authorities

Article 16 of the Norms also encourages NGO's to use the Norms to bolster their work to seek accountability by corporations. Specifically, NGO's should use the Norms as a benchmark for their monitoring activities and to hold tobacco companies directly accountable for human rights violations. *Id.* art. 16 cmts.

97. Norms on Responsibilities of Transnat'l Corps., *supra* note 95, art 13; Commentary on Norms, *supra* note 96, art. 13 cmts (b), (c), (e).

C. Regional Human Rights Norms on Right to Life and Health

Many regional treaties also enshrine the right to health and can be creatively used to combat the use of tobacco. The African Charter, for example, which came into operation in 1983 places special emphasis on the rights and duties of the community—especially the family, society, and nation. The Charter embraces “third generation” economic, social, and cultural rights, including the right to a healthy environment. Article 16 (1) of the African Charter provides that “every individual shall have the right to enjoy the best attainable state of physical and mental health.”⁹⁸ Further, Article 18 recognizes the State’s responsibility to protect the family and take care of its “physical health and moral.”⁹⁹ The African Charter also holds States accountable to protect against international monopolies that engage in “foreign economic exploitation.”¹⁰⁰

Recent developments in the region show an increasing focus on the status of women’s rights in Africa. For example, the Additional Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa¹⁰¹ was adopted in 2003. It establishes that the social well-being of women is contingent on rights to equality, health, education, and political participation in economic, electoral, and customary institutions.¹⁰²

The American Declaration of the Rights and Duties of Man (American Declaration) established by the Organization of American States (OAS) guarantees urban conditions that offer opportunities for a healthful, productive, and full life.¹⁰³ Article 11 establishes that “[e]very person has the right to the preservation of his health through sanitary

98. African (Banjul) Charter on Human and Peoples’ Rights art. 16, Jun. 27, 1981, 21 I.L.M. 58, available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.

99. *Id.* art. 18.

100. *Id.* art. 21.

101. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, opened for signature July 11–Aug. 13, 2003, available at http://www.achpr.org/english/_info/women_prot..htm.

102. *Id.*

103. See Organization of American States [O.A.S.] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992), available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”¹⁰⁴ The Additional Protocol of the American Convention on Human Rights advances the goals of the American Declaration by providing that the right to health includes “the enjoyment of the highest level of physical, mental and social well-being.”¹⁰⁵

Although the Asian region lacks a similar human rights charter or mechanism, the 1983 Declaration of the Basic Duties of ASEAN (Association of Southeast Asian Nations) Peoples and Governments—to which Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei Darussalem are parties—enshrines the right to life and health-related rights to Asians.¹⁰⁶

The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950, enshrines the right to life in Article 2(1).¹⁰⁷ The European Social Charter, adopted in 1961, articulates the right to protection of health in Article 11, which imposes a duty upon the parties to the agreement to “take appropriate measures designed *inter alia*: . . . to remove as far as possible the causes of ill-health.”¹⁰⁸

The European Union’s efforts to restrict the advertising and use of tobacco products in its Member States have been in the form of Directives.¹⁰⁹ Thus, the Member States have had to enact domestic legislation that fulfills the requirement of each Directive.

104. *Id.* art. 11.

105. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) art. 10(1), *opened for signature* Nov. 17, 1988, O.A.S. Treaty Series 69, *reprinted in* 28 I.L.M. 156 (entered into force Nov. 16, 1999). The Inter-American system for protecting human rights has three distinct legal sources: (1) the Charter of the OAS, (2) the American Declaration, and (3) the American Convention on Human Rights.

106. Declaration of the Basic Duties of Association of Southeast Asian Nations [ASEAN] Peoples and Governments, Dec. 9, 1983, *in* 1 ASIA-PACIFIC HUMAN RIGHTS DOCUMENTS AND RESOURCES 170 (Fernand de Varennes ed., 1998).

107. European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art 2(1), *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention] (entered into force Sept. 3, 1953).

108. European Social Charter art. 11, Oct. 18, 1961, Europ. T.S. No. 35, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965).

109. In 1989, the European Union issued Directive 89/552/EEC, which provided a legal framework for television broadcasting in the internal market. Article 13 of this Directive required Member States to ban all tobacco advertising on television. Consequently, EU

The European Court of Human Rights (ECHR) is authorized to render decisions on petitions from any person, NGO, or group claiming to be or to represent the victim of a violation by a State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European HR Convention) of any of the rights protected by that instrument.¹¹⁰ The ECHR has issued judgments in response to individual petitions alleging violations of the rights to life, respect for private and family life, and freedom to receive information based on various aspects of States Parties' tobacco control legislation.

Although the European HR Convention does not contain a right to health or right to a clean environment, both the right to life in Article 2 and the right to respect private life and home under Article 8 have been held to impose positive obligations on the State.¹¹¹ In *McCann v. U.K.* the ECHR held that Article 2, which protects the right to life, imposes

Member States that had not yet prohibited television advertising of tobacco products were required to do so. *See* Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23.

In 1997, the European Parliament and Council amended Directive 89/552/EEC to "clarify certain definitions or obligations." Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1997 O.J. (L 202) 60.

In 1998, Council Directive 98/43/EC further extended Member States' obligations to ban advertisements of tobacco products. This Directive required Member States to ban all forms of tobacco advertising, as well as tobacco company brand name sponsorship of public events within their state. Intended as a comprehensive advertising ban, Directive 98/43/EC was designed to prohibit all forms of direct and indirect tobacco advertising, sponsorship, and promotion. *See* Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products, 1998 O.J. (L 213) 9. However, the validity of the Directive was challenged, and it was annulled by the European Court of Justice (ECJ) in 2000. *See* Case C-376/98, *F.R.G. v. European Parliament and Council of the European Union*, 2000 E.C.R. I-8419.

In 2003, the European Parliament and European Council passed Directive 2003/33/EC of the European Parliament and of the Council of May 26, 2003 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products, 2003 O.J. (L 152) 16:

The legislation of the Member States to be approximated is intended to protect public health by regulating the promotion of tobacco, an addictive product responsible for over half a million deaths in the Community annually, thereby avoiding a situation where young people begin smoking at an early age as a result of promotion and become addicted.

110. European Convention, *supra* note 107, art. 34.

111. *Id.* arts. 2, 8.

an obligation on the state not only to refrain from taking life but also to take appropriate steps to safeguard life.¹¹² The ECHR has interpreted Article 8 to cover the rights of persons individually and directly affected by environmental pollution.¹¹³ The decision in *Fadeyeva v. Russia* implies that the State must take effective measures to protect persons from the harmful effects of even a private party.¹¹⁴ Further, in *Lopez Ostra v. Spain*,¹¹⁵ the Court held that the positive obligations imposed on the state mean that respect for private life may involve the adoption of measures designed to secure respect for private life even in the sphere of the relation of individuals between themselves. This is an important and radical interpretation of the provision and extends the state's responsibility to regulate the behavior between private parties in circumstances where the state could reasonably be expected to act.

At the same time, smokers may argue that Article 8 protects their right to smoke in the privacy of their homes. A consideration of the proportionality of the interference with smokers' rights under Article 8 requires consideration of the evidence of the risks of exposure to secondhand smoke in order to balance the rights of smokers and non-smokers under Article 8. Another argument to consider is that the ECHR standards provide a floor of protection, not a ceiling, and States can go further than what the European HR Convention requires provided that it does so in a way that is not incompatible with other rights in the Convention.

In 1998, in *Wockel v. Germany*,¹¹⁶ the European Commission on Human Rights heard a complaint from a non-smoker that Germany's laws failed to provide non-smokers with effective protection; and therefore, the German state must, under the relevant provisions of the European HR Convention, promulgate legislation prohibiting smoking in public so as to protect non-smokers. The Commission in *Wockel* made the following findings:

112. *McCann v. U.K.*, App. No. 18984/91, 21 Eur. Ct. H.R. Rep. 97 (1995).

113. *Hatton v. United Kingdom*, 37 Eur. Ct. H.R. 28, ¶ 96 (2003); *see also Fadeyeva v. Russia*, App. No. 55723/00, ¶¶ 68–70 (2005), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search for *Fadeyeva v. Russia*).

114. *See id.*

115. *Lopez Ostra v. Spain*, App. No. 16798/90, 20 Eur. H.R. Rep. 277, ¶ 51 (1995).

116. *Wockel v. Germany*, App. No. 32165/96, 25 Eur. H.R. Rep. 156 (1998) (Commission Report), *quoted in* 1 Health Bill, 2005, H.C. Bill [69] (U.K.), *available at* <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/96/9604.htm>.

The Commission finds that bearing in mind the competing interests of the applicant as a non-smoker and of the interests of other individuals to continue smoking and the margin of appreciation left to the national authorities, the absence of a general prohibition on advertising of tobacco products and on smoking does not amount to a failure on the part of the German state to ensure the applicant's rights under Article 2 and 8 of the Convention.¹¹⁷

Although *Wockel* represents the position of the Commission under the European HR Convention, the recent emergence of nonsmoking norms in Ireland, Norway, Sweden, Italy, Great Britain, and France suggests that if the case had arisen today, the outcome might well have been different. Indeed, the adherence of Germany and of the European Community to the Framework Convention on Tobacco Control, which requires Member States to adopt measures "providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places,"¹¹⁸ as well as the Guidelines on Protection from Exposure to Tobacco Smoke, as elaborated by the second session of the Conference of the Parties in June and July of 2007,¹¹⁹ make clear that "protection" in this context requires complete prohibition of smoking in the relevant places. This almost certainly moots *Wockel* on its specific facts.

D. Treaty Body Monitoring Mechanisms

The implementation of the core human rights treaties is monitored by committees of independent experts known as treaty monitoring bodies created under the auspices of the United Nations. Each of the major

117. *Id.* This decision of the European Commission on Human Rights provides guidance regarding the scope of States Parties' commitments to protect non-smokers from the risks of exposure to secondhand smoke. Although the European Commission declared inadmissible a German citizen's request for an order requiring the German legislature to enact more far-reaching prohibitions on smoking in public in accordance with Articles 2 and 8 of the European Convention, the Commission noted that this decision rested on the fact that the German government had already undertaken a public information campaign on the health risks of smoking, imposed restrictions on tobacco advertising, and prohibited smoking in certain public areas. This decision confirms that Articles 2 and 8 of the European Convention impose certain affirmative obligations on States Parties to protect non-smokers' rights through public education and legislation. *Id.*

118. FCTC, *supra* note 11, art. 8(2).

119. See World Health Org., *Decisions of the Conference of the Parties to the FCTC*, WHO Doc. A/FCTC/COP2/DIV/9 (2007), available at http://www.who.int/gb/fctc/PDF/cop2/FCTC_COP2_DIV9-en.pdf.

human rights treaties has its own monitoring body which meets regularly to review State Party reports and to engage in a constructive dialogue with governments on how to live up to their human rights obligations.¹²⁰

State Party reports can play an important catalytic role, contributing to the promotion of national debate on human rights issues, encouraging the engagement and participation of civil society, and generally fostering a process of public scrutiny of government policies.¹²¹ If State Party reports as well as NGO reports to the CEDAW, CRC, and CESCRC treaty monitoring bodies highlight the relationship between tobacco control, women's and children's equality, and the right to health, as well as the right to access information, these reports will catch the treaty monitoring bodies' attention and spark action on tobacco control. At the end of each session, the treaty monitoring body makes "concluding observations" on how the government can improve its human rights record: These could also serve as a rich body of evidence to support litigation, policy, and advocacy on tobacco control.

120. There are several core international human rights treaties. Each of these treaties has established a committee of experts to monitor implementation of the treaty provisions by its State Parties. Some of the treaties are supplemented by optional protocols dealing with specific concerns. The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. See OHCHR.org, International Law, <http://www2.ohchr.org/english/law/index.htm>. They are created in accordance with the provisions of the treaty that they monitor. The Human Rights Committee (OHCHR.org, HRC, <http://www2.ohchr.org/english/bodies/hrc/index.htm>) monitors implementation of the ICCPR and its optional protocols; the Committee on Economic, Social and Cultural Rights (OHCHR.org, CESCR, <http://www2.ohchr.org/english/bodies/cescr/>) monitors implementation of the ICESCR; the Committee on the Elimination of Discrimination Against Women (UN.org, CEDAW, <http://www.un.org/womenwatch/daw/cedaw/>) monitors implementation of the CEDAW; the Committee on the Rights of the Child (OHCHR.org, CRC, <http://www2.ohchr.org/english/bodies/crc/>) monitors implementation of the CRC and its optional protocols.

121. Under treaty body reporting obligation, States must submit an initial report, usually one year after joining (two years in the case of the CRC), and then periodically in accordance with the provisions of the treaty (usually every four or five years). In addition to the government report, the treaty bodies may receive information on a country's human rights situation from other sources, including NGOs, U.N. agencies, intergovernmental organizations, academic institutions, and the press. In the light of all the information available, the Committee examines the report together with government representatives. Based on this dialogue, the Committee publishes its concerns and recommendations, referred to as *Concluding Observations*.

1. Reporting Under the ICESCR

The Committee on Economic, Social and Cultural Rights (CESCR), established in 1987, is the legal body charged in the International Covenant on Economic, Social and Cultural Rights (ICESCR) with monitoring state compliance with the Convention and drafting interpretations of the various provisions. The Committee has stated that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health such as food and nutrition, housing, access to safe and potable water, adequate sanitation, safe and healthy working conditions, and a healthy environment.”¹²²

According to the “benchmarks and indicators” approach adopted by CESCR, which monitors States Parties’ progress on economic, social and cultural rights, it is incumbent upon the government to elaborate a national strategy, assess resources available, and identify the most cost-effective way to attain a rights-based goal.¹²³ Under this approach, specific benchmarks must be set to measure state progress on these rights. These indicators and benchmarks hold the states accountable for action, and States cannot use progressive realization rhetoric as an excuse for inaction.¹²⁴

In discussing specific action to be taken by States under Article 12.2 (b), (c), and (d), CESCR has recommended specific state obligations under the right to a healthy workplace and environment to “discourage[] the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.”¹²⁵ The Committee has also articulated that States bear the responsibility to protect persons from corporate infringements of Article 12, specifically assigning state responsibility for “failure to discourage . . . consumption of tobacco.”¹²⁶ The Committee interpreted Article 12 in its *General Comment 14* as requiring States Parties to implement tobacco control measures. The Committee recommended that States Parties undertake “information campaigns, in particular with respect to . . . the use of cigarettes, drugs and other harmful

122. ECOSOC *General Comment 14*, *supra* note 18, ¶ 4.

123. *See generally id.*

124. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 316–20 (2d ed. 2000).

125. ECOSOC *General Comment 14*, *supra* note 18, ¶ 15.

126. *Id.* ¶ 51.

substances.”¹²⁷ The Committee also concluded that a state’s responsibility to improve environmental and industrial hygiene covers prohibitions on the “use of tobacco, drugs and other harmful substances.”¹²⁸

The *General Guidelines* issued to governments for reporting on the right to health under the ICESCR provide a concrete example of what the treaty monitoring body with primary responsibility for implementation of the right to health considers the governments’ obligations with respect to the right to health.¹²⁹ For example, under the *General Guidelines of the ICESCR*, the Committee asks the State Party to provide information on how the government intends to improve the physical and mental health situation of vulnerable and disadvantaged groups in impoverished areas.¹³⁰ Furthermore, in its report, the State Party is asked to focus on what measures the government is taking to “reduce the stillbirth rate and infant mortality and to provide for the

127. *Id.* ¶ 36.

128. *Id.* ¶ 15.

129. See generally OHCHR.org, CESCR, Monitoring, <http://www2.ohchr.org/english/bodies/cescr/> (last visited Nov. 23, 2008): States Parties (countries that have ratified the ICESCR) are required to submit an initial report to the Committee within two years of ratification. Thereafter they are required to submit a periodic report every five years on measures taken toward the realization of the ESC rights enshrined in the Covenant, including through international cooperation. The state report is a public document. The review takes place at public meetings at which representatives of the government introduce the report and answer questions by Committee members. The Committee essentially holds a conversation—termed a “constructive dialogue”—about the government’s implementation efforts. The Committee meets twice a year in sessions of three weeks each (April/May and November/December), at the Palais Wilson in Geneva, Switzerland. Occasionally, an extraordinary third session is held to deal with the backlog. Reports are considered roughly in the order in which they were submitted, with some variations to provide geographical balance and a balance of initial and periodic reports in each session. Countries are invited to be reviewed according to a list drawn up by the Committee at each session for future sessions. Governments that have been scheduled for review at a particular session, but decide to withdraw presentation of the report, are not granted a deferment. The Committee will go forward with the consideration of the report without a State party representative. Countries that have ratified the Covenant and were placed in the queue for review, but failed to submit a report (non-reporting countries), will be reviewed in light of all available information relevant to ESC rights including NGO information. The Committee makes an effort to review one non-reporting country at each session.

130. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *Revised General Guidelines Regarding the Form and Contents of Reports to Be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, art. 12.5(b), U.N. Doc. E/C.12/1991/1 (June 17, 1991).

healthy development of the child.”¹³¹ Finally, the State Party, as well as NGOs, are asked to describe in a report the measures taken by the government to “prevent, treat and control epidemic, endemic and occupational and other diseases.”¹³² These Guidelines provide an entry point for a discussion on tobacco control and especially measures taken to combat the exposure of women and children to secondhand smoke.

2. *Reporting Under the ICCPR*

Article 40 of the International Covenant on Civil and Political Rights (ICCPR) obliges States Parties to submit reports to the Human Rights Committee within one year of the ICCPR coming into force and thereafter in five year intervals.¹³³ The reports should indicate measures adopted to give effect to rights in the ICCPR. It should also indicate the factors and difficulties affecting the implementation of those rights. The Committee expects the States Parties to indicate in their reports the manner in which human rights knowledge is promoted at every level of society within that State. Participation is one of the most important rights enshrined in the ICCPR. This right includes participation of

131. *Id.* art 12.5(e).

132. *Id.* art 12.5(g).

133. ICCPR, *supra* note 68, art. 40:

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

NGOs in State Party reporting under the human rights conventions including the ICCPR.

Individual communications addressing tobacco-related human rights violations can be filed with the Human Rights Commission against the government of a country where a tobacco company is operating or against the government of the country if it is complicit with the tobacco industry. Such a communication could be based on alleged violations of the "inherent right to life" under Article 6(1) of the ICCPR.¹³⁴

The Human Rights Committee has emphasized that "it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate . . . epidemics."¹³⁵

The tobacco industry regularly seeks . . . [the cover of] freedom of expression. However, Article 19(2) is subject to the exceptions [to the right of free speech] in Article 19(3).¹³⁶ Article 19(3) provides that the exercise of the rights covered by Article 19(2) carries 'special duties and responsibilities,' including compliance with certain restrictions provided by law that are necessary for the protection of public health.¹³⁷

Under Article 19(3) of the ICCPR, which directs governments to ensure that their citizens are aware of health risks resulting from smoking and secondhand smoke, countries that have not taken adequate measures to conduct public awareness campaigns and warn the public about tobacco would be in violation of Article 19(2). When tobacco advertising targets particularly vulnerable groups such as women and children, the accountability for the violation of the rights of women, children, and other at-risk populations is even greater.

3. Reporting Under the CRC

Article 44 of the Convention on the Rights of the Child (CRC) requires that "States parties undertake to submit to the Committee . . . reports on the measures they have adopted which give effect to the rights recognized [by the Convention] and on the progress

134. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.* art. 6, ¶ 1.

135. ICCPR, U.N. Human Rights Comm., *General Comment No. 06: The Right to Life* (Art. 6), U.N. Doc. CCPR/C.30/04/82 (Apr. 30, 1982).

136. See Crow, *supra* note 3, at 234.

137. *Id.*

made in the enjoyment of those rights.”¹³⁸ This is done within two years of ratification of the CRC by a State Party and thereafter every five years.¹³⁹ States Parties are requested to provide relevant information pursuant to Article 4 of the CRC, including information on the measures taken to harmonize national law and policy with the provisions of the CRC.¹⁴⁰

The CRC Committee has also identified tobacco consumption under the Convention’s state reporting guidelines. Under the *General Guidelines for Periodic Reports* established by the CRC Committee, States are requested to “provide information on legislative and other measures taken to prevent the use by children of such substances.”¹⁴¹

4. Reporting Under the CEDAW

Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires each State Party to submit an initial report to the Committee within one year after the entry into force of CEDAW and periodic reports every four years thereafter.¹⁴² The reports should illustrate the legislative, judicial, administrative and other measures the State Party has taken to give effect to the provisions of CEDAW.¹⁴³

138. CRC, *supra* note 9, art. 44.

139. CRC, Comm. on the Rights of the Child, *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties Under Article 44, Paragraph 1(a), of the Convention*, U.N. Doc. CRC/C/5 (Oct. 30, 1991).

140. *Id.* ¶ 11.

141. CRC, Comm. on the Rights of the Child, *General Guidelines for Periodic Reports*, U.N. Doc. CRC/C/58, ¶ 157 (Nov. 20, 1996).

142. CEDAW, *supra* note 10, art. 18.

143. UN.org, CEDAW, Reporting, <http://www.un.org/womenwatch/daw/cedaw/reporting.htm> (last visited Nov. 24, 2008).

See generally UN.org, CEDAW, <http://www.un.org/womenwatch/daw/cedaw/index.html> (last visited Nov. 23, 2008): The Committee on the Elimination of Discrimination Against Women, which was established under Article 17, consists of 23 experts to monitor compliance with CEDAW. They are elected by the States Parties to the Convention for a term of four years and serve in their personal capacity. A working group examines the report and sends a written request for additional information to the State Party. The State Party submits a written reply answering the questions raised by the working group. The report is then discussed at a meeting between representatives of the Government of the State Party and the Committee. A synthesis of the discussion is presented in the press release. After deliberation, the Committee draws its conclusions about the performance of the State Party and publishes them in its concluding comments, which offer guidance for the further implementation of the Convention by the State

The guidelines for the report recommend that reports cover the period of time since the consideration of the last report by the Committee on the Elimination of Discrimination Against Women; and furthermore, they should take into account the deliberations of the Committee concerning the preceding report and include legal and other measures adopted to implement the Convention since the last report.¹⁴⁴

When preparing CEDAW Reports, States Parties and NGOs should consider, under Article 12 of the CEDAW, the health problems among women who smoke including the increased exposure of women to secondhand smoking. The Committee is allowed to glean information from specialized agencies, such as tobacco control advocates, in evaluating state party reports and in monitoring the implementation of the recommendations.¹⁴⁵ Thus, all efforts should be made by tobacco control NGOs to seize this opportunity to put forward data on the pernicious effects of tobacco on women.

Data should also include an examination of the increased risk of infertility and ectopic pregnancy associated with smoking, adverse reproductive outcomes reported with smoking or the use of smokeless tobacco during pregnancy, the strong correlation between smoking while using oral contraceptives and coronary heart disease, and the health effects among nonsmoking women whose partners smoke.

E. Treaty Body Jurisprudence on Tobacco Control

The jurisprudence of human rights treaty bodies establishes that tobacco control initiatives inform the rights to health, life, and freedom of information. One of the chief virtues of these treaty body mechanisms is that they provide a process of constructive dialogue that can be utilized to engage government representatives in developing effective country-specific strategies for addressing the implementation of the FCTC.

The UN Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, and the UN Committee on the Rights of the Child have all expressed

Party.

144. U.N. Int'l Human Rights Instruments, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, ¶ E (Subsequent Periodic Reports), U.N. Doc. HRI/GEN/2/Rev.1/Add.2 (May 5, 2003) [hereinafter *Compilation of Guidelines*].

145. CEDAW, *supra* note 10, art. 22.

concern about the prevalence of tobacco use in certain countries and made recommendations intended to prevent future tobacco related violations of the CEDAW, ICESCR, and the CRC. For example, the Committee on the Rights of the Child in its 2000 *Concluding Observations on South Africa* stated that the Committee expressed “concern regarding the limited availability of programs and services and the lack of adequate data” in a range of areas including alcohol and tobacco use.¹⁴⁶ The Committee also noted that “while the State Party has taken a tough anti-smoking stance with the introduction of strong legislation in 1991 and amendments in 1999 to control the supply of tobacco, many underage smokers are still able to buy tobacco products.”¹⁴⁷

In its 2003 *Concluding Observations on Yemen*, the Committee on Economic, Social and Cultural Rights put on record its concerns “about the high level of tobacco consumption in the State party, especially among youth.”¹⁴⁸ Similarly, the Committee on Economic, Social and Cultural Rights considered the 2002 *Initial Report of Lithuania on the Implementation of the International Covenant on Economic, Social and Cultural Rights*¹⁴⁹ and recommended that the State Party “ensure the effective implementation of programs to combat tobacco smoking and alcoholism, and to report back to the Committee on this issue in its next periodic report.”¹⁵⁰ The Committee was also concerned about Estonia’s high morbidity rate due to tobacco use in its 2002 *Concluding Observations on Estonia*.¹⁵¹

146. CRC, Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: South Africa*, ¶ 31, U.N. Doc. CRC/C/15/Add.122 (Feb. 22, 2000) [hereinafter *CRC Concluding Observations on South Africa*].

147. *Id.*

148. ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Yemen*, ¶ 23, U.N. Doc. E/C.12/1/Add.92 (Dec. 12, 2003).

149. ECOSOC, *Initial Report of Lithuania on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/1990/5/Add.55 (Dec. 9, 2002).

150. ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Lithuania*, ¶ 49, U.N. Doc. E/C.12/1/Add.96 (June 7, 2004).

151. ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Estonia*, ¶ 29, U.N. Doc. E/C.12/1/Add.85 (Dec. 19, 2002).

In the UN Committee on the Elimination of Discrimination Against Women's 2000 *Concluding Observations on Moldova*, the Committee requested that the government "provide statistics on women's tobacco, alcohol, and drug use and other substance abuse."¹⁵²

Concluding Observations of the different committees are important because they can carry considerable weight with both governments and nongovernmental actors, although much depends on how these comments are later used in advocacy platforms. NGOs and tobacco control advocacy groups can play an important role in influencing the committees' concluding observations by preparing and presenting independent reports to the treaty bodies responsible for reviewing the countries' initial reports. Recognizing the importance of NGOs' firsthand knowledge of the country's situation, the various treaty monitoring bodies generally ask governments whether they have involved NGOs in preparing the government report. Additionally, the treaty monitoring bodies frequently invite direct input from NGOs—both from those that have consultative status with the U.N. Economic and Social Council (ECOSOC)¹⁵³ and those that do not—in the form of independent or shadow written reports and oral presentations to bring the country's residents' concerns to national and international attention.

Before the periodic reports are presented to the Committee at the regularly-scheduled session, a "pre-sessional" working group discusses five State Party reports scheduled for review with each group member serving as a "country rapporteur" for one of the reports. The country rapporteur is responsible for preparing a list of issues concerning the particular report. The list of issues is then sent to the State Party, which is required to provide written replies in advance of the session at which

152. CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Republic of Moldova*, ¶ 110, U.N. Doc. A/55/38, ¶¶ 67–117 (June 30, 2000) (discussing the *Initial Report of Moldova*, CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Initial Report of the States Parties: Republic of Moldova*, U.N. Doc. CEDAW/C/MDA/1 (Oct. 26, 1998); see also CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, *Summary Records of the 478th, 479th, and 484th Meetings*, U.N. Docs. CEDAW/C/SR.478, 479, 484 (June 21 and 27, 2000).

153. ECOSOC is a UN organ under the authority of the General Assembly, which serves as the central forum for discussing international economic and social issues. See generally UN.org, ECOSOC, <http://www.un.org/ecosoc/> (last visited Nov. 24, 2008).

its report is scheduled for review. NGO input at this stage of the process is critical as it will ensure that issues of concern to NGOs find their way into the list of issues and will be the focus of the dialogue between the Committee and the State Party. To participate at this stage, NGOs generally submit written information directly to the country rapporteur and/or to the Secretariat in advance of the pre-sessional group meetings. NGO representatives are also permitted to make oral statements in person during the first morning of the pre-sessional working group meeting.¹⁵⁴

During the pre-sessional stage, tobacco control advocates from different regions of the world should work to initiate collaboration with the Committees through reports focusing on tobacco's negative implications on the right to health. The report should emphasize that a government's failure to prevent women's and children's exposure to secondhand smoke violates core ICESCR, CEDAW, and CRC guarantees—the health of women and children being a priority for the ICESCR, CEDAW, and CRC treaty monitoring bodies. Such reports could potentially inform future recommendations by the treaty monitoring bodies. By providing the information on the ground, NGOs can help the committees to focus on tobacco-related violations of the right to health during constructive dialogue sessions. These conversations could spark country-specific recommendations by the treaty monitoring bodies to address violations of the right to health enshrined in the ICESCR, CEDAW, and CRC.

Given that the treaty bodies actively seek information from NGOs, NGOs can use this as an opportunity to advance their agenda nationally and internationally. This will encourage human rights treaty bodies to consider governments' tobacco control records with input from tobacco control advocates and NGO's. Issues of non-compliance can be addressed during constructive dialogue sessions with the treaty bodies. In response, treaty bodies could address specific recommendations and make more informed observations addressing tobacco control.

154. See Mara R. Bustelo, *The Committee on the Elimination of Discrimination Against Women at the Crossroads*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 79 (Phillip Alston & James Crawford eds., 2000).

II. MAINSTREAMING A GENDER PERSPECTIVE IN TOBACCO CONTROL

*The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women.*¹⁵⁵

*[G]ender equality in society must be an integral part of tobacco control strategies and women's leadership is essential to its success.*¹⁵⁶

The WHO has estimated that the number of women who smoke will grow to over 500 million worldwide, and more than 200 million of these women will die prematurely from tobacco-related diseases.¹⁵⁷ It is estimated that while smoking will decrease among women in developed countries, developing countries will exhibit the greatest growth in smoking rates among women.¹⁵⁸ Adding to these concerns, studies reveal that cigarette smoking is more harmful to women than men. While smoking reduces men's lives by three years, it reduces women's lives by eleven years.¹⁵⁹ WHO studies conducted recently show that women develop lung cancer with lower levels of smoking compared to men and are more at risk of contracting small-cell lung cancer.¹⁶⁰

Women do not even have to be active smokers to be negatively affected by tobacco. Apart from the harm caused by direct smoke, women are often the victims of secondhand smoke. Given that a

155. ECOSOC *General Comment 14*, *supra* note 18, ¶ 20.

156. WHO, *WOMEN AND THE TOBACCO EPIDEMIC: CHALLENGES FOR THE 21ST CENTURY X* (Jonathan M. Samet & Soom-Young Yoon, eds., 2001) [hereinafter *WOMEN AND THE TOBACCO EPIDEMIC*] (quoting the Kobe Declaration, adopted by the 1999 WHO Conference on Women and Tobacco); *see also* Press Release, WHO, Kobe Declaration Calls for a Halt to the Tobacco Menace Among Women and Children (Nov. 18, 1999).

157. *See* Amanda Amos & Margaretha Haglund, *From Social Taboo to "Torch of Freedom": The Marketing of Cigarettes to Women*, *TOBACCO CONTROL*, Spring 2000, at 3, 8 (citing a personal communication from the World Health Organization).

158. NAT'L COUNCIL FOR RESEARCH ON WOMEN, *GAINS AND GAPS: A LOOK AT THE WORLD'S WOMEN* (Mar. 2006).

159. Jan Hoogenboezem, *More and More Women Are Dying of Lung Cancer*, *STATISTICS NETHERLANDS*, July 12, 2004, <http://www.cbs.nl/en-GB/menu/themas/gezondheid-welzijn/publicaties/artikelen/archief/2004/2004-1493-wm.htm>; *see also* *Findings*, *WASH. POST*, Feb. 1, 2005, at A9 (examining CBS data).

160. WHO, *GENDER, HEALTH AND TOBACCO* (Nov. 2003), *available at* http://www.who.int/gender/other_health/Gender_Tobacco_2.pdf.

majority of smokers in the developing world are men, passive smoking has a disparate impact on women's physical health. In order to understand why secondhand smoke has such a disparate impact on women, we must look at it in the context of gender discrimination and the general vulnerability of women in the developing world.

Women throughout the developing world face systemic gender-based discrimination in laws, policies, and practices that deny them equal rights as human beings. In many countries, women are regularly denied equal treatment by law or by custom—denied an equal right to life,¹⁶¹ security of person,¹⁶² full legal capacity,¹⁶³ healthcare, education,¹⁶⁴

161. Although Article 14 of Iraq's new Constitution, which came into operation in October 2005, states that Iraqis are equal before the law, Article 2 provides that no law should contradict the "established provisions" of Islam. IRAQI CONSTITUTION (2005). Under this provision, Shiite women would need the permission of their families to get married and men would be able to divorce by stating their intention three times.

The 1976 Jordanian Law of Personal Status, Temporary Law no. 61/1976, Official Gazette No. 2668 of Dec. 1, 1976 (replacing the 1951 Code), and the 1954 Egypt-issued Gaza Law of Family Rights (applicable to all Muslims in the Gaza Strip) govern Muslim women of the West Bank and Gaza respectively. A woman's decision to marry is restricted by the laws, which require the permission of a male guardian. While women need to obtain a divorce through the court system, the laws allow husbands to divorce their wives verbally. Moreover, the laws in force in the West Bank and Gaza ensure that rapists who marry their victims are not prosecuted. HUMAN RIGHTS WATCH, *A QUESTION OF SECURITY: VIOLENCE AGAINST PALESTINIAN WOMEN AND GIRLS* (2006).

162. Despite the broad recognition of the right to equality before the law, discrimination against women still continues in many countries, particularly in the context of family. For example, the Penal Code of Northern Nigeria provides that assault is not an offense if inflicted by a husband for the purpose of correcting his wife so long as it "does not amount to the infliction of grievous hurt." Northern Nigeria Penal Code § 55(1)(b). The Civil Code of Chile provides that the marital partnership is to be headed by the husband, who shall administer the spouses' joint property as well as the property owned by his wife. Civil Code art. 1749 (Chile). In Algeria, under Article 39 of the Family Code of 1984, the wife is required to obey her husband and recognize his position as the head of the family, nurse her progeny if she is capable and rear her progeny and respect her husband's parents and close relatives. Family Code art. 39 (Algeria). In Mali, under Article 7 of the Code of Marriage and Guardianship of 1962, the husband must give protection to the wife, and the wife obedience to her spouse. Code of Marriage and Guardianship, art. 7 (Mali). In Yemen, under Article 40 of the Personal Status Act of 20, 1992, a husband has a right to his wife's obedience in matters affecting the family's interests. Personal Status Act, 1992, art. 40 (Yemen). For example, a wife "must permit him (her husband) to have illicit intercourse with her" and that "she must not leave the conjugal home without him." *Id.*

163. See, e.g., *Muthamma v. Union of India*, (1999) 4 S.C.C. 260: In this case, the petitioner challenged Rule 8(2) of the Indian Foreign Service Rules which required her to obtain the permission of the Government before solemnizing her marriage. Under Indian law, if the Government was of the view that her marriage would come in the way of her service, she could

employment,¹⁶⁵ inheritance, and freedom of movement. Additionally, women are deprived of full access to economic and political decision making processes in their families and in their communities. Women's unequal status drives them to tolerate exposure to secondhand smoke: Because of pervasive gender inequality, women are less able to negotiate safe spaces in the home and workplace, thus rendering them vulnerable to secondhand smoke.

As a result, women and children in the developing world face severe risks of disease, and even fatalities, due to prolonged exposure to secondhand tobacco smoke.¹⁶⁶ They are disproportionately affected largely because of their general disempowerment and inability to control their environment, a consequence of their lack of social, economic, and political power.¹⁶⁷ A woman's ability to safeguard her own health and that of her family depends on her ability to participate as a citizen in her community, to earn a living, to own and control property, and to be free from discrimination on the basis of gender, race, class, and religion. Ultimately, tobacco control as a human right is meaningful only when seen as part of this full constellation of rights.

At the same time, there is proof that tobacco companies are preying on women's relative lack of information on the harm of tobacco and their lack of agency to provide a counterweight to the onslaught of women-specific marketing tactics. While gender discrimination and the weak bargaining position of women in the developing world increase their vulnerability to the health hazards of smoking, low-income women

be required to resign. This rule did not apply to male members of the civil service.

164. See, e.g., ECOSOC, Econ. and Soc. Comm. for Asia and the Pacific, *Report on the Current Economic Situation in the Region and Related Policy Issues*, ¶¶ 46–47, U.N. Doc. E/ESCAP/63/3 (Feb. 16, 2007) [hereinafter ESCAP Report]: In the Asian-Pacific region, where enrollment of girls in primary schools is as much as twenty-six percent lower than that of boys, the gender gap in education has created a \$16–30 billion economic loss in the region.

165. See, e.g., Charles J. Ogletree & Rangita de Silva de Alwis, *When Gender Differences Become a Trap: The Impact of China's Labor Law on Women*, 14 YALE J.L. & FEMINISM 69, 81 (2002): Retirement provisions mandating that women should retire earlier than men have plagued labor policies all over the world, especially in Asia. In China women are called upon to retire at age 55 while men remain in employment much longer.

166. While the number of tobacco-related deaths from "active smoking" in China is staggering (47,300), "passive smoking" (i.e., exposure to secondhand smoke) killed just as many women (48,400), according to new study findings by researchers at the University of California, Berkeley. See Press Release, University of California, Berkeley, Researchers Find That Passive Smoking Kills As Many Women As Active Smoking in China (Sept. 4, 2005), available at http://www.berkeley.edu/news/media/releases/2005/09/04_smoking.shtml.

167. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

with limited access to information often fall prey to the unethical marketing strategies adopted by the tobacco industry. These marketing and advertising practices have a disparate impact on women because of the pervasive gender gap in health care, information, and education in developing countries.¹⁶⁸

Using gender lenses to examine tobacco control law and policy demonstrates that protecting public spaces from secondhand smoke is insufficient to protect women and children—these bans cannot protect women and children from secondhand smoke in the home. Just as domestic violence is no longer considered a private offense outside the realm of legal control, secondhand smoke in the home should no longer remain outside the ambit of public law and policy. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which helps to protect women from discrimination and abuse in both the private and public spheres, is a useful lens with which to examine women's rights with respect to exposure to secondhand smoke. Exposure to secondhand smoke directly increases the risk of fatalities among women, and therefore, it can be analogously redefined as a form of violence against women under CEDAW. Although the harm resulting from exposure to secondhand smoke might be unintended, CEDAW addresses both intended and unintended consequences of discrimination and gender bias.¹⁶⁹

168. See Katherine Culliton, *The Impact of Alcohol and Tobacco Advertising on the Latino Community as a Civil Rights Issue*, 16 BERKELEY LA RAZA L.J. 71 (2005).

169. CEDAW, *supra* note 10, art. 1:

For the purpose of the Convention, the term 'discrimination against women' means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other fields.

CEDAW, *supra* note 10, art. 2:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with

In developing countries, women are often powerless to stand up to the male members of their families who expose them to secondhand smoke. As one Vietnamese woman evocatively stated, "[o]ut of 100 men, 99 smoke. If you're afraid of tobacco then you'll have to live alone: it will be very depressing."¹⁷⁰ Additionally, the feminization of part-time and informal work means that more women are forced to work at home. As a result, restrictions on smoking in the workplace are not sufficient protection for women who work primarily in the home. For example, women and children are disproportionately concentrated in the *beedi* industry, where ninety percent of the workers work at home.¹⁷¹ Women's and children's general disempowerment makes them victims of this industry, and the low wages reinforce the inequality, thus perpetuating a cycle of poverty and vulnerability among women and children.

Fortunately, the patriarchal view of the male as head of household is a construct that is being slowly dismantled throughout the world,¹⁷² and

men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

170. Nancy J. Kaufman & Mimi Nichter, *The Marketing of Tobacco to Women: Global Perspectives*, in *WOMEN AND THE TOBACCO EPIDEMIC*, *supra* note 156, at 69, 85.

171. See Jayati Gosh, *Globalization, Export-Oriented Employment for Women and Social Policy: A Case Study of India*, *SOCIAL SCIENTIST*, Nov.-Dec. 2002, at 17, 39-40 ("the well-known case of workers in the *beedi* . . . industry, where approximately 90 per cent of the total workforce consisted of women and children working at home").

172. In a 1983 Japanese case, several women employees (all married women who were supporting children as registered heads-of-households) sued their employer, Nissan Motor Company, for its refusal to pay them family allowances, which were worth more than ten percent of their salaries. The company insisted that, consistent with traditional norms, husbands should be considered the heads-of-households. Although the Tokyo District Court held that it was not discriminatory to treat men as the actual heads-of-households, on appeal to the high court, the company changed its policy and agreed to the pay family allowances to a female employee who supported her family. Judgment of Jan. 26, 1989, Chisai [District Court], 533 Rodo Hanrei 45 (Japan) (cited in Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 *HARV. WOMEN'S L.J.* 83, 103-04).

In the Indian case of *Githa Hariharan v. Reserve Bank of India*, lawyers used the equality

this will undoubtedly have resonance in controlling tobacco use in the home. Historically, men have been considered as heads-of-households, and the failure to recognize women as heads-of-household has impeded the way in which women control resources and make decisions in the family. The questions of who is the head-of-household and which powers are invested in the head-of-household are central to marriage, family relations, and the general well-being of the children. In communities where men are considered the heads-of-households, wives and daughters have little control over family finances, whether money is spent on tobacco, and whether smoking is permitted around other family members. The recognition of women as joint heads-of-households is an important precursor to women being able to control the smoking habits of family members.

Women's education is another important tool in combating tobacco use in the developing world. Not only is education a key determinant of development and the most effective way out of the cycle of poverty, it may also be the most powerful vaccine against tobacco, tobacco campaigns, and tobacco advertising. Currently, education in most of the

provisions of the Indian Constitution to challenge constraints placed on a mother by the Reserve Bank of India to be a guardian of her son's investments during the lifetime of the father. *Githa Hariharan v. Reserve Bank of India*, (1999) 2 S.C.C. 228. This provision was based on Section 6 of the Hindu Minority and Guardianship Act of 1956 which provides that "[t]he natural guardians of a Hindu minor . . . are . . . [t]he father, and after him, the mother" Hindu Minority and Guardianship Act No. 32 of 1956, § 6. Although the court did not dismantle the impugned provision, the court agreed that the phrase to which exception is taken, i.e., "the father and after him the mother," does on a plain reading, suggest that the mother can be considered to be the natural guardian of the minor only after the lifetime of the father. *Githa Hariharan v. Reserve Bank of India*, (1999) 2 S.C.C. 228. The court also ruled that the two international instruments, CEDAW and the Beijing Declaration, direct state parties to take appropriate steps to prevent all forms of discrimination against women. *Id.* The court observed that domestic courts in India are under an obligation to interpret domestic laws in line with international conventions and norms. *Id.*

In *Zwaan-de Vries v. the Netherlands*, the U.N. Human Rights Committee ruled that legislation that discriminated between male and female heads-of-households is discriminatory. Zwaan de Vries was denied long-term unemployment benefits because she was not the family "breadwinner." Married men, however, could receive unemployment benefits even if their wives were the principal income earners or breadwinners. The Human Rights Committee held that Article 26 of the ICCPR provides that all persons are entitled to equal protection of the law without any discrimination. In this case, the legislation required married women to meet a condition that did not apply to married men and was not based on objective or reasonable criteria. The legislation was repealed before the decision, and an appropriate remedy for Mrs. Zwaan de Vries was recommended. *F.H. Zwaan-de Vries v. the Netherlands*, Judgments U.N. Human Rights Comm., Commc'n. No. 182/1984, U.N. Doc. Supp. No. 40 (A/42/40) at 160 (Apr. 9, 1987).

developed world is unequal. The cost of gender gaps in education in the Asian region alone has been estimated to be between \$16–30 billion a year.¹⁷³ Similarly, the gender gap in the data on smoking prevalence among women in the developing world has hindered the development of women-specific tobacco control programs. The tobacco industry thrives on those who have limited access to information about the risks associated with tobacco. The lack of women-specific prevention and cessation programs results in unequal access to education and information on tobacco control. Without equal access to education and information, women can never become equal partners in tobacco control or tobacco cessation. In developing countries, women are often unaware of the correlation between disease and smoking.¹⁷⁴ Equal access to education enhances a woman's agency and her ability to make informed choices about smoking. Education is pivotal to better health, and mothers who are educated often make better choices with respect to their and their families' health.

Tobacco is a critical gender issue for several other important reasons. For example, women are often forced into the role of caregiver of persons suffering from tobacco-related health problems. Women continue to bear this unequal burden at enormous physical, mental, and emotional costs. Additionally, in low income communities, the cash spent on tobacco deprives the most marginalized members of the family (i.e., women and children) of needed food, healthcare, and education. In Vietnam, for example, a WHO and national health survey estimated that over fifty percent of men smoke and the poorest communities are the most vulnerable to smoking hazards.¹⁷⁵ An average Vietnamese male spends 1.7 times more on cigarettes than the education expenditure per capita and 1.5 times the health expenditure per capita.¹⁷⁶ And according to the Vietnam Health Ministry, the average expenditure on cigarettes is enough to feed 10.6 million Vietnamese a year.¹⁷⁷

173. ESCAP Report, *supra* note 164.

174. See Mira Aghi et al., *Initiation and Maintenance of Tobacco Use*, in WOMEN AND THE TOBACCO EPIDEMIC, *supra* note 156, at 49.

175. WHO, TOBACCO FACT SHEET: VIETNAM, available at http://www.who.int/tobacco/media/Viet_Nam.pdf.

176. PATH CANADA AND WORK FOR A BETTER BANGLADESH, TOBACCO AND POVERTY FACT SHEET, available at http://wbb.globalink.org/public/poverty_factsheet.pdf (citing HOANG VAN KINH & SARAH BALES, TOBACCO CONSUMPTION PATTERN—AN ANALYSIS USING VIET NAM NATIONAL LIVING STANDARD SURVEY DATA (1990)).

177. ESSON & LEEDER, *supra* note 13, at 35.

Another reason why tobacco is a critical gender issue is that women and children play a crucial role in growing tobacco and hand-rolling *beedis*.¹⁷⁸ The cause-and-effect relationship between poverty and women in low-wage positions is especially evident in women's work in the *beedi* industry in countries such as Bangladesh and India. Women in these industries work under enormous hardship and in near bonded labor conditions. This results in further economic disempowerment of already marginalized women. A study commissioned by UNICEF on child work in the *beedi* industry in Bangladesh in 2000 documents the unequal status of women in the *beedi* industry.¹⁷⁹ The low pay drives more women and children to this work, and the *beedi* industry preys on the disadvantaged status of women and children in underprivileged areas in remote parts of Bangladesh. Although most *beedi* factories have stopped using child labor, young girls still continue to work in the home-based *beedi* industry.¹⁸⁰

Understanding the link between tobacco and the feminization of poverty will lead to better policies and programs to address tobacco control in general. A gender perspective to tobacco control will also bring to the surface the need to counter the commoditization of women and the frequent portrayal of women as sex objects in tobacco advertising and promotional campaigns that lure more men and women to smoke. Women are also exploited in other ways to market tobacco. Alyssa Woo writes that, "Young women in Benson & Hedges T-shirts gave away free cigarettes to the crowd at a beach volleyball tournament in The Gambia, one of Africa's poorest countries. The organizer of this youth event, held during the school holidays, was British American Tobacco (BAT), the producer of the two main cigarette brands in The Gambia: Piccadilly and Benson & Hedges."¹⁸¹ Idealized images of women's bodies are often manipulated in unethical marketing and advertising to falsely link tobacco to both women's empowerment and

178. For an extensive examination of the labor conditions in the *beedi* industry for women and children, respectively, see Priya Raghavan, *Bidi Workers in Ahmedabad, India: Monotonous Work, Low Pay*, in TOBACCO AND POVERTY: OBSERVATIONS FROM INDIA AND BANGLADESH 30 (Debra Efroymson ed., 2002) and Therese Blanchet, *Child Work in the Bidi Industry, Bangladesh*, in TOBACCO AND POVERTY: OBSERVATIONS FROM INDIA AND BANGLADESH 37 (Oct. 2002).

179. Blanchet, *supra* note 178, at 37.

180. *Id.* at 39.

181. Alyssa Woo, *Health Versus Trade: The Future of the WHO's Framework Convention on Tobacco Control*, 35 VAND. J. TRANSNAT'L L. 1731-32 (2002).

glamour.¹⁸² This exploitation of women in tobacco advertising must be addressed within the framework of gender discrimination.

Women and girls are often absent in public health strategies in developing countries, and health services and plans are often biased toward men.¹⁸³ Ignoring unequal distribution of power in family life and the political nature of family relationships results in gender bias in tobacco control policy and law. The reality of women's lives is inadequately captured in tobacco control policies, and women and children are sometimes invisible in tobacco control laws. In countries where women's access to healthcare is limited, diseases caused by tobacco result in a double burden on women. Thus, the lack of gender-sensitive tobacco control policies and laws only exacerbate women's unequal access to health care.¹⁸⁴

The recognition that women, as a vulnerable group, are affected by both direct and secondhand smoke will help legislators and policy makers bring a gender perspective to law and policy making on tobacco control. Given that women are often last in line for healthcare and access to other resources, including food, gender should be considered a key determinant of vulnerability in drafting tobacco control laws.¹⁸⁵ Women smokers and potential women smokers need to be given equal rights and equal access to gender-focused information and healthcare, and women workers in tobacco production need to be protected from the harmful effects of tobacco production, violations of employment rights,

182. For example, in Sri Lanka the local tobacco companies provide free cigarettes to women at university campuses and at shopping malls. See Dresser & Marks, *supra* note 6, at 631.

183. See Johanna E. Bond, *International Intersectionality: A Theoretical and pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71 (2003).

184. Appleberry, *supra* note 16, at 314–15 (footnotes omitted):

Furthermore, women's vulnerability is compounded by gender-specific risks and historic and continuing underinclusion in health research. Although research increasingly includes diverse female populations, much of the earliest evidence on tobacco's effects was based on male models. As a result, issues of crucial importance to women's health remain unexplored and poorly understood. For instance, some studies demonstrate a higher incidence of lung cancer in women than in men with the same level of exposure to smoke. Though this indicates that women may be more susceptible to the carcinogenic effects of tobacco, (a factor with vast implications for health and public policy), adequate resources have not been devoted to resolving the question. Even with this insufficiency of research, the list of gender-specific afflictions is long

185. See generally WHO, 'EN-GENDERING' THE MILLENNIUM DEVELOPMENT GOALS (MDGs) ON HEALTH (2003).

and exploitation in the workplace. Gender mainstreaming in tobacco control will involve making sure that the goal of gender equality is central to all activities, including policy development, research, advocacy, legislation, resource and budgetary allocation, and the implementation and monitoring of programs. The WHO stated that “[i]f health care systems are to respond adequately to problems caused by gender inequality, it is not enough simply to ‘add in’ a gender component late in a given project’s development. Research, interventions, health system reforms, health education, health outreach, and health policies and programs must consider gender from the beginning.”¹⁸⁶

As countries develop new tobacco control policies and laws, it is important they ask themselves some important gender-related questions: Are women’s interests and concerns central to tobacco control and cessation policies in the country? Do programs developed to control tobacco assist women and men equally? Is women’s unequal status factored into these laws, policies, and programs? Is there an interagency effort to ensure that women’s and children’s rights are integrated into the planning and realization of tobacco control policy? One way to deal with these concerns would be for governments to integrate a “gender budget” into any new tobacco control law or policy to allocate a percentage of the program’s funds specifically for gender-related tobacco control programs.¹⁸⁷

Just as a tobacco-free environment is implicit in the realization of the rights of women and children, the war against tobacco must be seen within this context of inequality and general powerlessness of vulnerable communities. Gender-disaggregated data is a powerful tool to evaluate gaps in any program, policy, or development scheme. Gathering gender-disaggregated data on tobacco will raise gender issues to the forefront, bolster efforts to pass gender-friendly tobacco legislation, and provide accurate benchmarks to measure needs and

186. WHO, What is “Gender Mainstreaming”?, <http://www.who.int/gender/mainstreaming/en/> (last visited Nov. 24, 2008).

187. See ISABELLA BAKKER, GENDER BUDGET INITIATIVES: WHY THEY MATTER IN CANADA 3 (2006); ISABELLA BAKKER, U.N. DEVELOPMENT PROGRAMME [UNDP], FISCAL POLICY, ACCOUNTABILITY AND VOICE: THE EXAMPLE OF GENDER RESPONSIVE BUDGET INITIATIVES (2002); DEBBIE BUDLENDER & GUY HEWITT, COMMONWEALTH SECRETARIAT, GENDER BUDGETS MAKE MORE CENTS: COUNTRY STUDIES AND GOOD PRACTICE (2002) [hereinafter GENDER BUDGETS MAKE MORE CENTS]; Helena Hofbauer, *Gender-Sensitive Budget Analysis: A Tool to Promote Women’s Rights*, 14 CAN. J. WOMEN & L. 98 (2002).

remedies. Women are disparately impacted by tobacco in so many ways; it is essential that these inequalities are acknowledged and studied, and that gender-specific tobacco control policies and laws are developed.

A. Utilizing CEDAW to Control Women's Exposure to Tobacco

The FCTC's reference to the intersectionalities and complementarities of the FCTC, CEDAW, CRC, and ICESCR requires that the spirit of these human rights treaties guide the reading of the FCTC.¹⁸⁸ Furthermore, the FCTC calls for women's participation in developing tobacco control policy and their participation in the implementation of these policies.¹⁸⁹ The FCTC also recognizes the contribution of women's groups in tobacco control.¹⁹⁰ While efforts to integrate gender equality will result in gender-sensitive tobacco control policies, the harmonization of the FCTC with the CEDAW will enhance policies of antidiscrimination.

Traditionally, human rights were seen as a tool that governed state action and any violation of human rights that took place in the public sphere. The CEDAW, which came into force in 1979, created a paradigm shift in human rights, and for the first time, a human rights convention addressed both public and private acts, thereby dismantling the artificial construct between the private and the public spheres that had been reinforced by previous treaties and national laws.¹⁹¹

Although the CEDAW was one of the first international treaties to break down the private/public distinction in international law and hold both state and non-state entities accountable for women's rights violations, this concept is now well-entrenched in human rights jurisprudence and has been advanced in the newest human rights treaty, the Convention on the Rights of Persons with Disabilities (adopted in

188. The FCTC Preamble specifically references these treaties. FCTC, *supra* note 11, pmbl. For a discussion on the interrelatedness of the four treaties, see Crow, *supra* note 3, at 222.

189. FCTC, *supra* note 11, pmbl.

190. *Id.*

191. See CEDAW, *supra* note 10, art. 2(e) (addressing discrimination by any "person, organization or enterprise").

December 2006) which refers directly to both private enterprises and private entities.¹⁹²

As discussed before, the CEDAW guarantees the accountability of both private and public actors by setting out unequivocally in Article 2(e) that the CEDAW covers all discriminatory acts “by any person, organization or enterprise.”¹⁹³ This provision suggests that both public and private acts in the workplace, school, and public spaces, as well as in the family and home, can be regulated by the CEDAW. The CEDAW can also be used against “enterprises,” such as tobacco industries, thereby broadening and extending the traditional ambit of a convention to cover both state and non-state parties. Also, Article 5 of the CEDAW directs State Parties to take all steps to “modify the social and cultural patterns of conduct of men and women” and to take steps to eliminate “stereotyped roles for men and women.”¹⁹⁴ This Article clearly encourages the modification of cultural and traditional conduct that reinforces patriarchy. Patriarchy is often a major impediment to the control of tobacco in homes, and effective tobacco control must be located in the context of gender and age inequality of women and children in the family. In countries where patriarchy is embedded into the culture and family relations, the control of smoking is far more challenging. Therefore, it is important to situate tobacco control within a human rights framework, as this framework provides the dual function of challenging patriarchy and tobacco in the private and public spheres.

Further, the CEDAW covers both direct and indirect discrimination or *de jure* and *de facto* discrimination. In effect, the CEDAW covers both intended and unintended consequences of law and practice.¹⁹⁵ Thus, even when secondhand smoke is not intended to be discriminatory, the unintended or *de facto* discriminatory consequences can be regulated under the CEDAW, and enabling legislation must be drafted in order to give effect to the CEDAW.¹⁹⁶

192. U.N. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (entered into force Apr. 3, 2008).

193. CEDAW, *supra* note 10, art. 2(e).

194. *Id.* art. 5.

195. *Id.* art. 1.

196. *Id.* art. 3:

Parties shall take in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of

Another distinctive feature of the CEDAW is that it covers women's civil and political rights as well as economic, social, and cultural rights, and it sees these rights as indivisible, interrelated, and interdependent. For instance, women's and children's right to be free of secondhand smoke is dependent on the right to health, nondiscrimination, and information. The full realization of one right is connected to the actualization of the other. This notion of the indivisibility of rights is incorporated in both the CEDAW and CRC.

The CEDAW and other human rights treaties are useful lenses to look at how legislative reform pertaining to women and children can be used to control tobacco. Laws on women's equality establishing women's and children's equal rights to health are inextricably linked to tobacco control and strengthen the implementation of the FCTC. In applying this argument, it is important to look at the whole landscape of laws, to identify ongoing reform projects, and to use those projects as entry points to launch tobacco control advocacy. This helps to provide a broader range of potential alternatives and a more sophisticated understanding of the efficacy of the multiple strands of law. For example, in China, the reform of the Juvenile Protection Law in 2006 provided an opportunity to include a provision on youth and tobacco control.¹⁹⁷ In Vietnam, the newly promulgated Gender Equality Law of 2006 provides for gender equality in the public and the private spheres including the home and the family.¹⁹⁸ These gender and youth laws provide an important entry point to combat tobacco use in the home. For example, Article 1 of the Vietnam Gender Equality Law establishes that the law is meant to ensure the "equality of men and women in all areas of social life, namely political, economic, cultural, social and family."¹⁹⁹ Article 6 guarantees that "[m]an and woman are equal in all fields of social and family life."²⁰⁰ Given that the WHO reports that over fifty percent of Vietnamese children are exposed to secondhand smoke in their homes, gender and age equality are a prerequisite in the war against secondhand smoke in the home.²⁰¹

equality with men.

197. China Juvenile Protection Law of 2006, art. 8 (English translation on file with author).

198. See Law on Gender Equality, No. 73/2006/QH11, Nat'l Assembly of the Socialist Republic of Vietnam, 10th Sess. XI Legislature (2006).

199. *Id.*

200. *Id.*

201. WHO, 2003 GLOBAL YOUTH TOBACCO SURVEY (GYTS) IN VIETNAM: A PRELIMINARY REPORT ON YOUTH TOBACCO USE 6 (2003) [hereinafter 2003 GYTS VIETNAM].

The CEDAW provides for legislation in all fields and provides a blueprint for legislative reform.²⁰² The core principles of a rights-based approach are identified as: Equality and Non-Discrimination (all human beings are equally entitled to their rights regardless of gender, race, age, or religion); Participation and Inclusion (particular attention must be paid to the empowerment of vulnerable groups so that they can claim their own rights); and Accountability and the Rule of Law (rights can only be upheld if there are mechanisms to enforce the duty-bearers' obligation to meet the claims of right-holders).²⁰³ These core principles of the rights-based approach have particular relevance to the protection of women and children. Principles of equality and nondiscrimination are the cornerstones of the CEDAW and CRC, and they can help protect women and children from the unethical cigarette marketing practices of the tobacco industry. For instance, the right to information and counseling is a fundamental right enshrined in the CEDAW,²⁰⁴ and Article 19 of the ICCPR also guarantees the right of each person "to seek, receive and impart information and ideas of all kinds, regardless of frontiers."²⁰⁵ Given that women in developing countries generally have less access to information, the serious consequences associated with tobacco use are relatively unknown, and providing women with more information is essential to combating tobacco use.²⁰⁶

Popular participation and mobilization of the community is another cardinal tenet of the women's rights framework and can also be utilized in the campaign against tobacco.²⁰⁷ The rights discourse is a powerful tool to challenge stereotypes and discriminatory traditions, and the international women's rights framework can be a catalyst to mobilize national and grassroots organizations to address women's exposure to

202. CEDAW, *supra* note 10, art. 3 (see note 185 for the text of Article 3).

203. See Savitri Goonesekere & Rangita de Silva de Alwis, *Women's and Children's Rights in a Human Rights Based Approach* (UNICEF, Division of Policy and Planning, Working Paper) (on file with author).

204. CEDAW, *supra* note 10, arts. 12 & 14(2)(b).

205. Universal Declaration of Human Rights, G.A. Res.217A, art. 19, U.N. GAOR, 3d Sess., Supp. No. 51, U.N. Doc. A/810 (1948).

206. Lucien J. Dhooze, *Smoke Across the Waters: Tobacco Production and Exportation as International Human Rights Violations*, 22 FORDHAM INT'L L.J. 355, 432 (1998) (concluding that the U.S. governmental subsidization of the U.S. tobacco industry constitutes a human rights violation).

207. See generally Livia Maria Pedalini et al., *Public Health Advocacy on Behalf of Women in Sao Paulo: Learning to Participate in the Planning Process*, 14 J. PUBL. HEALTH POL'Y 183 (1993).

secondhand smoke in the family. Finally, the human rights approach calls for strong laws, enforcement mechanisms, and specific remedies as a way of vindicating rights,²⁰⁸ thus demanding the accountability of both the State and the tobacco industry for the violation of women's and children's rights to health.

B. Tobacco and Children's Rights

The effect of passive smoking on children has been well-documented by the WHO.²⁰⁹ Smoking by the mother as well as secondhand smoke has deleterious effects on prenatal and postnatal health. Tobacco affects the reproductive rights of women and violates the reproductive health guarantees enshrined in the CRC and the CEDAW. Infants whose mothers smoke have lower than average birth weight.²¹⁰ Sudden infant death syndrome is also common among babies exposed to secondhand smoke.²¹¹ Smokers who breastfeed may find it difficult to produce the same amount of milk as the nonsmoking mother.²¹² The increased risk of infertility²¹³ and ectopic pregnancy²¹⁴ are only some of the consequences of smoking and exposure to secondhand smoke on reproductive rights.²¹⁵ Exposure to secondhand smoke may also cause

208. See generally Marsha A. Freeman, *Women, Law, and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal Systems*, 16 HUM. RTS. Q. 559 (1994).

209. The WHO reports that over fifty percent of Vietnamese children are exposed to secondhand smoke in the home. 2003 GYTS VIETNAM, *supra* note 201.

210. Richard A. Windsor, *Smoking, Cessation, and Pregnancy*, in WOMEN AND THE TOBACCO EPIDEMIC, *supra* note 156, at 147 (linking SHS with a number of adverse health effects in children under 18, including lower respiratory tract infections (i.e., croup, bronchitis and pneumonia); increased fluid in the middle ear; upper respiratory tract irritation; reduced lung function; additional episodes of asthma; increased severity of asthmatic symptoms in children; and reduced oxygen flow to tissues, comparable to children with anemia, cyanotic heart disease or chronic lung disease).

211. *Id.*

212. Virginia Ernster, *Impact of Tobacco Use on Women's Health*, in WOMEN AND THE TOBACCO EPIDEMIC: CHALLENGES FOR THE 21ST CENTURY 2, 9, nts. 24–27 (2001) (collecting sources on milk production of women who smoke).

213. See *id.* at 2, 9, nts. 29–30.

214. Joël Coste et al., *Increased Risk of Ectopic Pregnancy with Maternal Cigarette Smoking*, 81 AM. J. PUB. HEALTH 199 (1991) (finding a supplementary argument for the causal link between ectopic pregnancy and cigarette smoking).

215. See, e.g., John D. Meeker et al., *Risk of Spontaneous Abortion in Women with Childhood Exposure to Parental Cigarette Smoke*, 166 AM. J. EPIDEMIOLOGY 571, 571–75 (2007).

lower-respiratory-tract illnesses in children, childhood asthma, and middle ear disease.²¹⁶ Smoking is also related to impaired cognitive development of the fetus and reduced lung function.²¹⁷

With 193 ratifications,²¹⁸ the CRC is the most widely ratified convention in the world and offers a comprehensive statement on children's rights. The best-interests-of-the-child principle is the spirit that animates all of the provisions of the CRC.²¹⁹ Other cardinal principles guiding the CRC include: the maximum possible survival and development of the child,²²⁰ the child's "right to the enjoyment of the highest attainable standard of health,"²²¹ "appropriate pre-natal and post-natal health care for [expectant] mothers," and the highest attainable standard of health to the maximum extent of available resources.²²² In *General Comment No. 4*, the Committee on the Rights of the Child asked States Parties "to regulate or prohibit information on and marketing of substances such as alcohol and tobacco, particularly when it targets children and adolescents."²²³

Children's rights conflict with tobacco in many ways. First, although most countries prohibit the sale of tobacco to children, the tobacco industry often promotes smoking in the developing world to youth, including through the use of sports and arts sponsorships—marketing techniques which deliberately mislead and target children. By failing to prohibit such tactics, governments give tobacco companies license to expand their base of consumers, who incur substantial health risks. By preying on children's relative lack of access to information, tobacco advertisements that link smoking to sports, success, and glamour mislead the young and exploit their vulnerability to harmful, addictive lifestyles.

216. See Jonathan M. Samet & Gonghuan Yang, *Passive Smoking, Women and Children*, in *WOMEN AND THE TOBACCO EPIDEMIC: CHALLENGES FOR THE 21ST CENTURY* 17, 24–32 (reviewing the documented adverse effects of environmental tobacco smoke on children).

217. See Windsor, *supra* note 210.

218. United Nations Children's Fund [UNICEF], *Convention on the Rights of the Child*, http://www.unicef.org/crc/index_30197.html (last visited Oct. 12, 2008).

219. "[W]hether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." CRC, *supra* note 9, art. 3(1).

220. *Id.* art. 6.

221. *Id.* art. 24.

222. *Id.*

223. *General Comment No. 4*, *supra* note 67, ¶ 21.

Second, in a stark example of the way in which essential family needs are often subordinated to tobacco, even the poorest households in Bangladesh spend more than ten times on tobacco than what they spend on education.²²⁴ When more money is spent on tobacco than on education, it is often the girl child's education that is most neglected. Although a whole host of issues impede a girl child's access to education, diminishing family income is often one of the main reasons why a girl child's education is interrupted. Although there is no evidence to show that money not spent on tobacco will automatically be used to meet unmet needs in the family, there is nevertheless a strong presumption that in families where money is scarce, money spent on tobacco could often be utilized to cover the bare necessities of life, including the girl child's education.²²⁵ The opportunity cost of tobacco is high as it diverts funds that could be better utilized to meet basic needs of the family. Around the world, lower income, lower education, and lower purchasing power increasingly translate into higher rates of smoking, and a higher probability of dying from it.²²⁶ This reality affects not just smokers, but smokers' families whose access to food is severely curtailed by the resources spent on tobacco products.

Undernutrition as an indirect consequence of household spending on tobacco deserves as much attention as the direct consequences of smoking on health. In low-income households around the world in countries such as Bulgaria, Egypt, Indonesia, Myanmar, and Nepal, surveys show that 5–15 percent of disposable income is spent on tobacco.²²⁷ Half of the world's malnourished children are in Bangladesh, India, and Pakistan, and tobacco has a major impact on increasing poverty and decreasing the food distribution in the family.²²⁸ In Bangladesh, for example, households with an income of less than twenty-four dollars a month smoke twice as much as those in higher-income households.²²⁹ If these men stopped smoking and put 69 percent of that income into purchasing food, 10.5 million Bangladeshi children

224. Debra Efroymson et al., *Hungry for Tobacco: An Analysis of the Economic Impact of Tobacco Consumption on the Poor in Bangladesh*, 10 TOBACCO CONTROL 212, 214 (2001) ("Tobacco expenditures exacerbate the effects of poverty and cause significant deteriorations in living standards among the poor.").

225. See MILLENNIUM DEVELOPMENT GOALS, *supra* note 13, at 36.

226. *Id.*

227. *Id.* at xiii.

228. ESCAP, *supra* note 164.

229. Efroymson, *supra* note 224, at 213.

would be saved from malnutrition.²³⁰ Furthermore, an average Vietnamese male spends 1.7 times more on cigarettes than the education expenditure per capita and 1.5 times the health expenditure per capita.²³¹ According to the Vietnam Health Ministry, the average expenditure on cigarettes is enough to feed 10.6 million Vietnamese a year.²³² This shows a clear correlation between tobacco and the erosion of the right to food and underscores the way in which the needs of women and children are often those that are sacrificed in favor of tobacco.

The use of child labor in the cultivation of tobacco is another particularly pressing concern.²³³ Not only does child labor violate a number of International Labour Organization (ILO) treaties, but child labor in tobacco cultivation constitutes one of the worst forms of child labor.²³⁴ Green tobacco sickness, which results from workers' exposure to nicotine released during cultivation and harvesting, is especially prevalent among youth.²³⁵ The symptoms of green tobacco illness include respiratory problems, weakness, and toxicity.

It is important to examine child labor in tobacco cultivation in the context of ILO treaty obligations. One of the most important conventions on child domestic labor is the 1973 ILO Convention Concerning the Minimum Age for Admission to Employment (Convention No. 138).²³⁶ In addition to establishing work conditions appropriate for children, Convention No. 138 sets a minimum age for joining the workforce. Article 2 of the Convention states that the minimum age for admission to employment "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be

230. *Id.* at 216.

231. PATH Canada and Work for a Better Bangladesh, *supra* note 175.

232. MILLENNIUM DEVELOPMENT GOALS, *supra* note 13, at 35.

233. "[O]ver 100,000 children are [engaged] in tobacco production" in Malawi alone. Dresser & Marks, *supra* note 6, at 622.

234. At the same time, tobacco farming has a negative impact on the environment as it causes deforestation. A report from Sri Lanka showcases that environmental consequences of tobacco include the depletion of fertile soil. See MILLENNIUM DEVELOPMENT GOALS, *supra* note 13, at 53.

235. See Jeffrey S. McBride et al., *Green Tobacco Sickness*, 7 TOBACCO CONTROL 294, 296 (1998) ("Younger workers are more likely than older workers to develop GTS").

236. Int'l Labour Org. [ILO] Convention Concerning Minimum Age for Admission to Employment, Convention No. 138, June 26, 1973, 1015 U.N.T.S. 297, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> [hereinafter ILO Convention No. 138] (entered into force June 19, 1976).

less than 15 years.”²³⁷ An exception to the minimum age of fifteen is made only for a state “whose economy and educational facilities are insufficiently developed,” which may “initially specify a minimum age of 14 years.”²³⁸ Article 5 allows countries with insufficiently advanced economies to be flexible in the application of Convention No. 138. This measure is only a transitional measure, and States Parties that adopt the lower age must establish in their state reports the reasons for lowering the age.²³⁹ In fact, the ILO’s *Recommendation Concerning Minimum Age for Admission to Employment (Recommendation No. 146)* provides that States that have a minimum age below fifteen should, as a matter of urgency, raise the minimum work age to fifteen.²⁴⁰ Article 2(b) of *Recommendation No. 146* also provides that it is open to a State Party to set its minimum age above fifteen.²⁴¹

On the other hand, the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182) calls for a global consensus to end the worst forms of child domestic labor²⁴² and requires States to take immediate measures to abolish such practices, defined as:

All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;

The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

237. *Id.* art. 2(3).

238. *Id.*

239. *See id.* art. 2(5); Constitution for the ILO, as amended Oct. 9, 1946, art. 22, 62 Stat. 3485, 15 U.N.T.S. 35.

240. ILO, Recommendation No. 146, *Recommendation Concerning Minimum Age for Admission to Employment*, art. 7(2) (June 26, 1973), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R146>.

241. *Id.*

242. *See* ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Convention No. 182, June 17, 1999, 38 I.L.M. 1207 (entered into force Nov. 19, 2000), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182.pdf>. The worst forms of child domestic labour include children who were previously trafficked and end up as child domestic labourers, those who are beaten and not allowed to leave the house, and those who may handle toxic substances. *Id.*

Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.²⁴³

Arguably, tobacco cultivation is implicated by Convention No. 182. The forms of employment addressed in the Convention are unacceptable and nonnegotiable, children must immediately be removed from such environments, and steps must be taken to eliminate such work. Other types of work are prohibited if they constitute “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”²⁴⁴ Under Convention No. 182, State Parties determine what constitutes prohibited, hazardous work in consultation with workers’ and employers’ organizations, considering “relevant international standards, in particular . . . the Worst Forms of Child Labor Recommendation.”²⁴⁵

Article 32 of the CRC protects the child “from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”²⁴⁶ To this end, states are obliged to take legislative, administrative, social, and educational measures to ensure the implementation of this Article. Article 32(b) also provides for appropriate penalties or sanctions to ensure the effective enforcement of the Article. Article 36 of the CRC seeks to protect the child against all forms of exploitation.²⁴⁷ Article 39 of the CRC is also applicable as it covers child victims from all forms of abuse and exploitation.²⁴⁸ These rights may be violated in the case of child labor in the tobacco cultivation.

In light of the CRC and ILO Conventions, tobacco control advocates should link with child rights and labor rights advocates to define child labor in tobacco cultivation as one of the worst forms of child labor. Given the overwhelming evidence as to the impact of green tobacco sickness, advocates could come together to challenge such employment practices as illegal under international law.²⁴⁹

243. *Id.* art. 3.

244. *Id.* art. 3(d).

245. *Id.* art. 4(1).

246. CRC, *supra* note 10, art. 32.

247. *Id.* art. 36.

248. *Id.* art. 39.

249. Considering briefly challenging such employment practices as unconstitutional under the Indian legal framework:

III. TOBACCO CONTROL: A CASE FOR HUMAN RIGHTS LITIGATION

A. Transforming International Human Rights Law into Domestic Action

The Vienna Convention on the Law of Treaties clearly states that a country that ratifies an international treaty “establishes on the international plane its consent to be bound by a treaty.”²⁵⁰ Once a treaty is ratified, the question remains as to how those treaty obligations can be translated into action. As discussed above, reporting is an important element of accountability under treaties. The treaty obligations also direct states to draft enabling legislation in conformity with the conventions. Litigation is another alternative—when used in conjunction with enabling legislation—to enforce treaty obligations, and domestic courts are increasingly “becoming active participants in the dynamic process of developing international law.”²⁵¹ Harold Koh cogently identified the need for state judicial action when he noted that

Article 23 and 24 of the Indian Constitution provide that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. INDIA CONST. arts. 23 & 24. Article 39 (e) and (f) provide that the state shall direct its policies towards securing the health and strength of workers, men, women, and children and that no one is forced by economic necessity to enter into employment not suitable to their age and strength. *Id.* art. 39(e) & (f). Article 45 strengthens the antichild domestic labor clauses by emphasizing that the state shall provide special provisions for free and compulsory education for all children until they complete the age of fourteen years. *Id.* art. 45.

The Indian Child Labour (Prohibition and Regulation) Act of 1986 provides that no child be allowed to work between 7 p.m. and 8 a.m., and to work overtime. Child Labor (Prohibition and Regulation) Act, No. 61 of 1986; INDIA CODE (1996). No child shall work for more than three hours before the child has a rest interval of at least an hour. *Id.* The total working hours including the rest time should not be more than six hours a day. *Id.* The law also makes provisions for the health and safety of the child and provides for cleanliness, disposal of waste, ventilation and temperatures in the place of employment. *Id.* The *beedi* industry’s employment of children is a breach of most of these national regulations and international convention. *See, e.g.,* Raghavan, *supra* note 178, at 41 (Beedi “[f]actory owners regularly ignore all the labor laws about maximum hours worked per day, mandatory vacations, decent working conditions, and minimum wage”).

250. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

251. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005) (conceiving the relationship between international and domestic legal norms as co-constitutive in which domestic courts are becoming active participants in developing international law).

the “obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into [a state’s] domestic legal system.”²⁵²

The ability to file claims in court is pivotal to the operationalization of social, economic, and cultural rights. The Committee on Economic, Social and Cultural Rights requires that when economic, social and cultural rights have been translated into legislative form, information must be provided to the Committee “as to whether such laws create any ‘right of action’ on behalf of individuals or groups who feel that their rights have not been realized.”²⁵³ Further, *General Comment 3* provides that where specific economic, social, and cultural rights have been raised to the level of a constitutional guarantee, or where the provisions of the Covenant have been adopted directly into national law, “the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e., able to be invoked before the courts).”²⁵⁴ In *General Comment 9*, the Committee on Economic, Social and Cultural Rights also noted that adjudicating economic, social, and cultural rights is an appropriate and legitimate role for courts or other bodies, and national courts must apply the provisions of the ICESCR either “directly or as interpretive standards.”²⁵⁵

Several countries have enshrined international laws in their constitutions or domestic laws, while others allow international human rights law to guide the interpretation of existing statutes. For example, the South African Constitution mandates that international law must be

252. Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2659 (1997); see also Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 1935 (2002); Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 123 (2005); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005) (presenting a general theory of the citation and authority of foreign law in American courts); Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555 (2002) (exploring the reasons offered by judges when they invoke international law).

253. ECOSOC, Comm. on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations*, ¶ 6, U.N. Doc. E/1991/23 (Dec. 14, 1990).

254. *Id.*

255. ECOSOC, Comm. on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N. Doc. E/1991/23, annex III (Dec. 3, 1998).

used to guide the interpretation of the law, and comparative laws may be used as interpretive tools.²⁵⁶ Further, Section 9 of the Bill of Rights of South Africa's Constitution includes a broad mandate to advance gender equality and to abolish gender discrimination.²⁵⁷

The constitutions of several countries provide for the right to health. For example, the Brazilian Constitution guarantees an affirmative right to health.²⁵⁸ However, this right has not been developed in legislation or case law. Article 32 of the Italian Constitution enshrines a right to health that is defined both as an individual and collective right.²⁵⁹ In India, the provision on the Right to Health which states that the improvement of public health should be regarded as one of the State's fundamental duties is found in the Fundamental Rights and the Directive Principles of State Policy.²⁶⁰ The Constitution of the Netherlands articulates the government's obligation to promote the health of the population.²⁶¹ The right to health in the South African Constitution is articulated in positive terms.²⁶² Newly independent Eastern European countries guarantee an aspirational right to health in their constitutions.²⁶³ The most recent draft of the Tobacco Control Bill of Mexico refers to the right to health and the rights of women, children, and indigenous populations in its preamble.²⁶⁴ Although these guiding principles or statements of objectives have not been further developed in the countries' bodies of law, it is hoped that the spirit of international

256. S. AFR. CONST. 1996, § 39 on the Interpretation of the Bill of Rights: "When interpreting the Bill of Rights, a court, tribunal or forum, (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and may consider foreign law."

257. Section 9 also contains a prohibition against direct and indirect discrimination. *Id.* § 9. Another Constitutional guarantee which has special significance to women is Section 12 of the Bill of Rights which states that "[e]veryone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources." *Id.* § 12.

258. See *Constituição Federal* art. 6 (Braz.).

259. See *Costituzione* art. 32 (Italy).

260. See *INDIA CONST.* art. 47.

261. See *Grondwet voor het Koninkrijk der Nederlanden* art. 22 (Neth. Const.).

262. See *S. AFR. CONST.* 1996.

263. See, e.g., *Konstytucja Rzeczypospolitej Polskiej* art. 68 (Pol. Const.) (guaranteeing "the right to health protection").

264. *Cámara de Diputados, LX Legislatura, Mexico, Draft Bill: Initiative by which the General Tobacco Control Law is created and several articles of the General Health Law are repealed*, pmbl.

human rights norms will guide the interpretation of their national laws and will be used to clarify ambiguities.

Many courts around the world direct the State to respect international law and treaty obligations. In the past few years, courts have increasingly transcended national boundaries to embrace a more universal commitment to human rights.²⁶⁵ Courts have held that the ratification of a treaty gives rise to a legitimate expectation,²⁶⁶ and that international conventions can be used to interpret national laws.²⁶⁷ Even when a country has not ratified an international convention, courts have held that in the absence of express words, the legislature may not have wanted the courts to act in opposition to such an international norm.²⁶⁸

265. See Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 381 (1999); Bahdi, *supra* note 251; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (2007); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 24 TULSA L.J. 15 (1998) (considering the changed nature of interactions between judges in different jurisdictions, the changing ways courts consider each others' judgments, and the role of the Rehnquist Court within the new global judicial community); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. V. 99 (1994); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000) (arguing that cross-fertilization has led to a "deep sense of participation in a common global enterprise of judging"); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

266. See *Minister for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 274 (Austl.).

267. Judges across jurisdictions have expressed the opinion that the ratification of a treaty constitutes a legally significant act and that domestic courts have a role to play to hold national governments accountable to their legal commitments. For example, in *R. v. Ewanchuk*, the Canadian Supreme Court relied on the CEDAW to emphasize that Canada has an obligation to prevent violence against women. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.). The Botswana Court of Appeals, in its celebrated *Unity Dow* decision, examined treaties ratified by Botswana as well as treaties yet to be ratified in its decision making. See *Unity Dow v. A.G.*, (1992) 103 I.L.R. 128 (Bots. Ct. App.). In its opinion, the Botswana court noted with approval the judgment of Justice Barker of New Zealand in *Birds Galore Ltd. v. A.G.*, where he held that "[a]n international treaty, even one not acceded to by New Zealand, can be looked at by this court on the basis that in the absence of express words Parliament would not have wanted a decision-maker to act contrary to such a treaty." *Id.* at 178 (citing *Birds Galore Ltd v. A.G.*, [1989] L.R.C. (Const.) 928, 939, reprinted in 90 I.L.R. 567, 578 (N.Z. High Ct. 1988) (1992)).

268. In *Baker v. Canada*, too, the Supreme Court of Canada used International law—specifically, Article 3 of the CRC—to reinforce the ruling that immigration officers must have regard for the best interests of the child principle. *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.) In *Tavita v. Minister of Immigration*, the Court of Appeal of New Zealand referred to the International Children's Rights Convention to uphold the state's obligation not to separate children from their parents as a universal human right. *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257, 266 (C.A.). Further, the court refused to accept that "New Zealand's adherence

It is not enough to ratify international human rights treaties; it is also important to translate these international norms domestically. This will involve the willingness of domestic courts and legislators to adapt and indigenize these norms. Several national courts, as in India and Bangladesh, have interpreted domestic human rights norms in light of norms contained in their constitutions and the human rights conventions. These decisions can inspire courts in the region to follow suit as well as spark international human rights treaty bodies to devote greater attention to tobacco-related human rights violations.

Certain common law jurisdictions have also been influenced by comparative law and have drawn creatively from different comparative sources to augment the courts' reasoning. This jurisprudence shows an admirable effort to stay in close touch with important legal developments around the world.²⁶⁹ Judges also look to decisions from other jurisdictions to buttress their particular reading of an international treaty and not simply to support their reliance on international law as a general matter. In such instances, judges invoke international and comparative legal sources not as legally binding, which can give rise to legal obligations, but to support the reliance on a given human rights norm.²⁷⁰

to international instruments has been at least partly window-dressing." *Id.* In *R. v. Poumako*, the same court reiterated that it "affirm[s] New Zealand's commitment to the International Covenant on Civil and Political Rights." *R. v. Poumako*, [2002] 2 N.Z.L.R. 695, 717 (C.A.).

269. In the Indian case of *S.P. Gupta v. Union of India*, which broadened *locus standi*, Justice Bhagwati cited public interest cases from the United States, United Kingdom, Canada, and Australia to define public interest law as a recognized form of rights vindication around the world. *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149.

270. In *Newcrest Mining*, for example, the dissenting opinion of Chief Justice Brennan of the High Court of Australia referred to the recognition "by this court and by other courts of high authority [that] the inter-relationship of national and international law, including in relation to fundamental rights, is undergoing evolution." *Newcrest Mining (WA), Ltd. v. The Commonwealth*, (1997) 190 C.L.R. 513, 657. Similarly, in rendering the *Vishaka* decision, the Indian Supreme Court pointed to the example of the Australian High Court and its invocation of international norms. *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011. In *Unity Dow*, Botswana's Court of Appeal cited speeches delivered at the judicial colloquium in Bangalore, India by Justice Michael Kirby of Australia and Chief Justice Muhammad Heleen of Pakistan. The Botswana court also referenced decisions by courts in England and New Zealand for affirmation that international law represents a valid interpretive aid in construing domestic legislation. *Unity Dow*, (1992) 103 I.L.R. 128.

In the same way, the Supreme Court of Canada invoked the Australian and Indian Courts' growing reliance on international law to support its own reference to the Convention on the Rights of the Child in analyzing the limits of a decision maker's discretion in the immigration context. *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.). Judges also look to decisions from other jurisdictions to buttress their particular reading of an international treaty and not simply to

Invocation of international norms in judicial decision making has the potential to transform the tobacco control movement. It can help facilitate the internationalization of human rights norms through the mutually enforcing processes of internal persuasion and international pressure. An examination of leading cases across jurisdictions reveals interesting insights into how international human rights norms can support domestic human rights claims to control tobacco and provide a forum for the enforcement of international instruments including the FCTC. Several jurisdictions, including courts in India,²⁷¹ Canada,²⁷² South Africa,²⁷³ and New Zealand²⁷⁴ have affirmed that international law

support their reliance on international law as a general matter. In such instances judges invoke international and comparative legal sources not as legally binding which can give rise to legal obligations, but to support the reliance on a given human rights norm. In *Kauesa v. Minister of Home Affairs*, Namibia's High Court examined treaties ratified by Namibia and those that clearly did not bind Namibia. *Kauesa v. Minister of Home Affairs*, 1995 (1) S.A.L.R. 51 (CC), available at 1995 SACLX LEXIS 273. These sources included the American Convention on Human Rights and the decisions of the Supreme Court of Canada.

271. For example, the Indian Supreme Court has ruled that it must "interpret language of the Constitution . . . in the light of the United Nations Charter and solemn declarations subscribed to by India . . . and construe our legislation so as to be in conformity with International Law and not in conflict with it." *Kesavananda Bharati v. State of Kerala*, (1973) Supp. S.C.R. 1, para. 165. Further, the Indian Supreme Court has ruled that any ambiguity in national laws must be interpreted in accordance with the State's international obligations and that "it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law where there is no inconsistency between them and there is a void in the domestic law." *Vishaka*, A.I.R. 1997 S.C. 3011.

272. *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.) (invoking the Australian and Indian Courts' growing reliance on international law to support its own reference to the Convention on the Rights of the Child in analyzing the limits of a decision maker's discretion in the immigration context).

273. *S. v. Williams*, (7) BCLR 861 (CC), available at 1995 SACLX LEXIS 249 (1995) (S. Afr.) (looking to various jurisdictions to identify a common thread or theme in the definition of "cruel and unusual punishment."):

Whether one speaks of "cruel and unusual punishment" as in the Eighth Amendment of the U.S. Constitution and in Article 12 of the Canadian Charter, or of "inhuman and degrading punishment," as in the European Convention and the Constitution of Zimbabwe, or "cruel, inhuman or degrading punishment," as in the Universal Declaration of Human Rights, the ICCPR, or the Constitution of Namibia, there is a common thread running through each phrase which links the prohibition against cruel and unusual punishment across jurisdictions to "decency and human dignity."

Thus, the Court used judicial reasoning from jurisdictions around the world as persuasive authority to support its own conclusion that whipping juveniles as a form of criminal sentencing violates the standards of humanity.

274. *R. v. Poumako*, [2000] 2 N.Z.L.R. 695 (H.C.) (N.Z.) (citing international and regional treaties to support the view that the international community condemns retrospective sentencing).

represents a valid interpretive aid in construing domestic legislation. The decisions discussed below, though not all directly related to tobacco control, can nonetheless spark human rights litigation on tobacco.

B. Tobacco Control as Integral to the Right to Life

The integration of international human rights norms into judicial decision making provides an important forum to develop frameworks and standards of application of international norms on tobacco control in domestic jurisdictions.²⁷⁵ Through public interest litigation, which has fueled many social movements and challenged traditional concepts of lawyering,²⁷⁶ lawyers should use human rights law in the judicial forum to advance the fight against tobacco use and tobacco companies.

275. The first judicial colloquium, held in February 1988 in Bangalore, adopted what have come to be known as the *Bangalore Principles*. Judicial Colloquium, Bangalore Principles, 1 DEVELOPING HUMAN RIGHTS JURISPRUDENCE IX, IX--X (Judicial Colloquium in Bangalore, India, 1988) [hereinafter *Bangalore Principles*]. The Bangalore Principles emphasize the universality of fundamental human rights norms and urge application of such norms in domestic cases in order to enhance the administration of justice and the protection of individual rights and freedoms. The Bangalore Principles were later supplemented by the Harare Declaration of Human Rights in 1989, the Banjul Affirmation in 1990, and the Abuja Confirmation in 1991. In his address before the Bangalore Colloquium, Justice Muhammad Haleem, the then Chief Justice of Pakistan, proposed that "all rules of general international law created for humanitarian purposes constitute *jus cogens*." Muhammad Haleem, *Domestic Application of Human Rights Norms*, in IV DEVELOPING HUMAN RIGHTS JURISPRUDENCE: A FOURTH JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF HUMAN RIGHTS NORMS 101 (Judicial Colloquium in Abuja, 1991). He took the position that "[t]he relationship between international law and municipal law is a question of determining what are the most appropriate judicial means of achieving, in state legal systems, the aims and intentions lying behind the rules established by international law. . . . A state has an obligation to make its municipal law conform to its undertakings under treaties to which it is a party." *Id.*

276. Scholars of cause lawyering and movement building argue that legal actions contribute to social movements by enhancing multiple and overlapping forms of advocacy, including activism, political mobilization, and social movements. Legal action consists of ongoing efforts, often by members of nongovernmental organizations, to influence policy in a particular area. See Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (Austin Sarat & Stuart A. Scheingold eds., 2006); Michael McCann & Jeffrey Dudas, *Retrenchment and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 37; Thomas Hilbink, *The Profession, the Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 60; Anna-Maria Marshall, *Social Movement Strategies and the Participatory Potential of Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 164; Corey S. Shdaimah, *Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 220.

The Right to Life Clause of the Indian Constitution has been interpreted expansively and creatively by the Indian Supreme Court to include the right to live with dignity and all the rights associated with living in dignity.²⁷⁷ The Indian Supreme Court has developed novel mechanisms to broaden access to justice and transform programmatic rights into justiciable rights. In fact, some human rights scholars view justiciability as a condition *sine qua non* for an entitlement to warrant classification as a human right.²⁷⁸

Human rights litigation has sparked the Indian Supreme Court to create procedural innovations to expand the constitutional interpretation of the fundamental right to life to cover the right to health. These tools have included using the Directive Principles of the Constitution and international human rights conventions as interpretive tools to broaden the interpretation of the right to life.²⁷⁹ Further, the Court has expanded *locus standi* to broaden access to courts to all those who have been marginalized and disempowered.²⁸⁰ The Court also created an "epistolary" jurisdiction which allows any person or organization to move the court by writing a letter.²⁸¹ In addition, the Court has appointed socio-legal commissions, composed of socio-legal experts to gather facts and submit detailed reports on their findings and make recommendations.²⁸² These socio-legal commissions of inquiry are also often appointed to monitor the court's rulings.²⁸³

In countries in South Asia, the Indian social action litigation revolution has sparked far reaching changes in the adversarial system.²⁸⁴

277. See, e.g., Michael R. Anderson, *Individual Rights to Environmental Protection in India*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 199 (Alan Boyle & Michael Anderson eds., 1996) (discussing the Indian Supreme Court's interpretations of the right to life as encompassing the right to a clean environment and the right to an adequate standard of life).

278. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 298 (1st ed. 1996).

279. See, e.g., Chairman, Ry. Bd. v. Das, A.I.R. 2000 S.C. 988.

280. See S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

281. Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 455-56 (1998) (discussing epistolary jurisdiction).

282. P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561, 574 (1985) (discussing socio-economic commissions and their work).

283. *Id.*

284. Akbar Ali v. State, 1991 S.C.M.R. 2114 (Pak.) (holding that every citizen has the right to obtain justice and facilitated public interest litigation by allowing simple and direct petitions to the Supreme Court as well as potentially widening the scope of justiciable rights).

This explosion of public interest litigation was sparked by a congruence of activist judges, socially conscious academics, and media personnel who provided the much needed investigative journalism to bring to the surface egregious human rights violations.

In India, human rights litigation soon became the vehicle through which constitutional guarantees could be realized. The spirit of the Directive Principles of the Indian Constitution together with international human rights have guided an expansive interpretation of the rights in the Constitution. Interpreting the right to life as a justiciable legal guarantee has allowed the Supreme Court to broaden the ambit of this right in a meaningful manner.

In *Shri Murli S. Deora, et al v. Union of India*,²⁸⁵ a public interest writ petition was initiated by the President of the Mumbai Regional Congress Committee, Murli Deora, against both the Union of India and major Indian tobacco companies. The petitioner in *Deora* argued that the Union of India had undermined its duty to safeguard the public health, especially "the health of children of tender age," and had failed to act to control tobacco use.²⁸⁶ The petition requested that the Ministry of Health and Family Welfare be directed to develop a comprehensive national tobacco control policy, including the elimination of public smoking, adoption of stronger health warnings on cigarettes, meaningful enforcement of advertising restrictions, control of sales to children, and creation of a fund to compensate victims of smoking to be funded by tobacco companies.²⁸⁷

The Indian Supreme Court based the ban on smoking in public places on the fundamental constitutional rights of every citizen to life, health, and a clean environment. At the suggestion of the petitioner's counsel, and with the agreement of the Attorney General, the Supreme Court ordered the States of India to issue immediate orders banning smoking in hospitals, educational institutions, railways and public transport, courts and public offices, and libraries and auditoriums nationwide.²⁸⁸

The Supreme Court also took up a second important aspect of the petition. Counsel for the petitioner had argued that Indian advertising restrictions and health warning requirements were "hopelessly unsatisfactory" and were being "shamelessly flouted," not only by

285. *Murli S. Deora v. Union of India*, (2001) 8 S.C.C. 765.

286. *Id.*

287. *Id.*

288. *Id.*

foreign periodicals that published advertisements without health warnings, but also by the tobacco companies' use of brand stretching and sports sponsorships to evade warning requirements—for example, by having cricket players wear tobacco company logos.²⁸⁹ The Supreme Court's order also directed police commissioners of major cities to report to the Court on actions they were taking to enforce the advertising code.²⁹⁰

Two years earlier, in 1999, in the landmark case of *Ramakrishnan v. State of Kerala*,²⁹¹ the court had held that smoking in public places constituted a public nuisance. In this public interest writ before the High Court of Kerala, the petitioner argued that the constitutional right to life includes a right to be free of public smoking and smoking-related disease.²⁹² Justice K. Narayana Kurup agreed, ruling that:

Public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise, is illegal, unconstitutional and violative of Article 21 of the Constitution of India. We direct the District Collectors of all districts of the State of Kerala . . . to promulgate an order under Section 133(a)Cr.P.C. prohibiting public smoking within one month from today and direct the Director General of Police . . . to issue instructions . . . to prosecute all persons found smoking in public places . . . by filing a complaint before the competent Magistrate . . .²⁹³

Additionally, the Court, acting on its own motion, added dozens of public officials to the list of respondents originally named by the petitioner to ensure enforcement of the Court's order that the State promulgate a prohibition against public smoking.²⁹⁴ Following the dismissal of an appeal, the High Court issued a supplemental order tightening its ruling and required police to file regular reports on their enforcement efforts. Finally, in May 2004, the National Anti-Smoking Act banned public smoking in India and provided for penalties for breach of the law.²⁹⁵

In Bangladesh, a group of anti-tobacco lawyers challenged British American Tobacco's (BAT) advertising practices on the grounds that

289. *Id.*

290. *Id.*

291. *Ramakrishnan v. State of Kerala*, 1999 A.I.R. 86 (Ker.) 385 (India).

292. *Id.* at 397.

293. *Id.* at 398, ¶ 26(i).

294. *Id.* at 398, ¶ 26(ii).

295. See Dresser & Marks, *supra* note 6.

such practices violated certain fundamental rights enshrined in the Bangladesh Constitution.²⁹⁶ The lawsuit was sparked by the Nov. 1999 arrival in Bangladesh's Chittagong Port of the Voyage of Discovery, a touring luxury yacht, as part of a BAT effort to grow a market for its Gold Leaf cigarettes among youth in Africa and Asia. The petitioners, officials of the Bangladesh National Drug Federation, alleged that BAT's exhibition of the vessel, which was covered with promotional messages without statutorily required health warnings, violated Bangladeshi citizens' constitutionally protected rights to life and liberty. Noting that the high rate of illiteracy in Bangladesh undermined the effectiveness of statutorily required health warnings, the petitioners argued for a total ban on the advertisement and promotion of tobacco products.²⁹⁷

The decision, issued by the Bangladesh Supreme Court on Feb. 7, 2000, cites numerous decisions from South Asian countries which emphasize the human rights dimension of tobacco control.²⁹⁸ Citing Articles 11 and 18 of the Constitution of Bangladesh—guaranteeing the right to dignity and health—the Court banned advertisements of tobacco products in newspapers, magazines, billboards, and electronic media beyond the period of any existing contracts with tobacco manufacturers or their agents.²⁹⁹ The Court further prohibited the Government of Bangladesh from undertaking or encouraging any promotional ventures that resembled "Voyage of Discovery."³⁰⁰ The Court also banned smoking in public places pursuant to Article 31 of the Constitution, which protects the right to life of Bangladeshi citizens, and called upon the government to take more far-reaching steps to halt the manufacturing, production, and marketing of tobacco products.³⁰¹

Although BAT obtained a stay of the judgment pending the hearing of the appeal, the Bangladeshi Supreme Court's decision offers a useful model for advocates and courts seeking to prevent tobacco-related human rights violations in other countries. What is most interesting is

296. See *Nurul Islam v. Bangladesh*, W.P. Nos. 1825/99, 4521/99 (2000), available at <http://www.elaw.org/node/1768> (applying Article 102 of the Constitution of the People's Republic of Bangladesh in the Supreme Court of Bangladesh).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

that human rights guarantees served as the impetus for the court decisions to regulate tobacco in India and Bangladesh, and in turn, these court decisions sparked legislative activity on this issue.

In the more recent case of *Sheikh Rafiqul Islam v. Government of People's Republic of Bangladesh*,³⁰² pending the decision, the Bangladesh Supreme Court served a stay order on respondents for advertising tobacco products as inducement promotions. A *rule nisi* (an order to show cause why the stay should not continue) was issued to Imperial Tobacco Company to show cause as to why the promotional advertisement activities of the company—giving away free IHAMES cigarettes by way of a lottery designed to entice new smokers—should not be prohibited.³⁰³

Nepal recently filed a writ petition in the Supreme Court against the Prime Minister's Office, the Cabinet Secretariat, Surya Nepal, the Kantipur Publication, and its Co-Publication Weekly (Saptahik) demanding the prohibition of Surya Nepal's Shikhar Musical Concert to promote their brands of Shikhar Lights and Shikhar Filter Kings with misleading, false messages—SAFALTAKO LIFE (SUCCESS OF LIFE)—in several places in Nepal, including on Feb. 10, 2007 at Biratnagar Stadium, Feb. 12 at Birgunj Stadium, Feb. 14 at Bhairahawa (City), Feb. 16 at Nepalgunj Stadium, and Feb. 18 at Pokhara stadium. The advertisements specifically targeted teenagers, children, and girls. A public interest suit was also filed by Nepalese advocates alleging violations of the public health rights of the Nepalese people and the human rights of non-smokers, infants, children, pregnant mothers, women, and teenagers, in terms of protection from environmental tobacco smoke. The challenge was based on provisions of the Interim Constitution protecting the right to life, the right to health, the right to a clean environment, and the right to women's reproductive health, as well as FCTC Articles of 8, 13, and 36. Human rights litigation has special relevance in Nepal because, as a monist regime, international norms apply directly after ratification. Thus, the UDHR, the ICESCR, the CRC, the CEDAW, and the FCTC can be incorporated directly into

302. *Sheikh Rafiqul Islam v. Bangladesh*, Writ Petition No. 7439 of 2002 (on file with author).

303. *Id.*

domestic law and applied by judges without the aid of special enabling legislation.³⁰⁴

C. Human Rights Litigation to Protect Health and the Environment

Court-centered lawyering is an important tool in human rights litigation with the potential to help advance government accountability and establish legal benchmarks in respect to economic and social rights. Courts are in a “unique position to push public policy in the right direction.”³⁰⁵ In some countries like India and South Africa, impact litigation has revitalized legal reform through an increasingly powerful perspective of the human rights paradigm. The next section of this article examines the principles that animated strategic litigation, advancing the health and environmental rights of individuals and communities in India. Similar efforts in the future might be used to promote tobacco control or be used in litigation against tobacco companies.

The right to life clause of Article 21 of the Indian Constitution has been the principal animating spirit behind right to health litigation in India. The Indian Supreme Court has developed a rich jurisprudence on the nexus between the rights to life and health. In a series of cases giving shape to the right to life, the Court found that the right to life includes the right to good health. In the landmark case of *Charan Lal Sahu v. Union of India*,³⁰⁶ the Indian Supreme Court interpreted the right to life guaranteed by Article 21 of the Constitution to include the right to a wholesome environment.³⁰⁷ Further, in *Subhash Kumar v. State of Bihar*,³⁰⁸ the court ruled that the right to a wholesome environment was

304. E-mail from Hom L. Shrestha, Practitioner, Public Interest on Tobacco Litigation, Non-Smokers' Rights Association of Nepal (June 3, 2007) (on file with author).

305. Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 336, 343 (Erik G. Jensen & Thomas C. Heller eds., 2003).

306. *Charan Lal Sahu v. Union of India*, A.I.R. 1990 S.C. 1480.

307. See also *Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420, available at <http://www.elaw.org/node/2751> (concluding that the right to life “is a fundamental right under Art. 21 of the Constitution, and it includes the right of enjoyment of pollution free water and air for full enjoyment of life”).

308. *Id.*

pivotal to the right to life as enshrined in Article 21 of the Indian Constitution. In several other cases the Supreme Court has affirmed that the assurance of healthy living and working conditions fall within the ambit of the right to life.³⁰⁹

Apart from the right to life clause of the Constitution, the Indian courts have also relied on international norms³¹⁰ in an attempt to harmonize domestic laws and policies with critical international norms. At a minimum, these litigation efforts have resulted in what Upendra Baxi describes as “a dialogue between [the] judiciary and executive on

309. *See, e.g., M.C. Mehta v. Union of India*, (1991) 1 S.C.R. 866 (concerning the duty of the state government, under Article 51, to ensure a better quality of environment). The Supreme Court ordered the central government to show the steps it has taken to achieve this goal through national policy and to restore the quality of the environment. *Id.* *See also Kirlskar Bros. Ltd. v. Employees' State Ins. Corp.*, 1996 S.C.A.L.E. (2)1 (India) (ruling that the expression “right to life,” as guaranteed in Article 21, includes a right to livelihood, better standards of living, and hygienic conditions in the workplace, as well as giving the workers leisure facilities and opportunities to eliminate sickness and physical disabilities).

310. *See, e.g., MX v. ZY*, 1997 A.I.R. (Bom.) 406 (relying extensively on documents of the WHO in a health-related case): The employer fired the petitioner after the employer found out the petitioner was HIV positive. The petitioner challenged his termination based on the guidelines of the Government of India under the National AIDS Control Programme, which states employees should not be removed from private or public employment solely on the basis of their HIV status. The petitioner argued for a constitutional right to livelihood based on the Indian Constitution. Although the High Court's decision was not altogether favorable towards the petitioner, what is important about this case is that in deciding whether the company's firing of the petitioner violated his rights, the court examined literature from the WHO. The literature from the WHO urges member states to avoid employment policies that discriminate against people infected with HIV. It also states that in the vast majority of occupations and occupational settings, work does not involve the risk of acquiring or transmitting HIV between workers, from the worker to the client, or from the client to the worker. The High Court also looked at the South African Code on HIV/AIDS and employment, which further supported the literature from the WHO.

See also Shri Subodh Sarma and Anr. v. State of Assam, 2000 A.I.R. (Gau.) 294, available at <http://www.lawyerscollective.org/hiv-aids/judgements/indian-public-health-subodh-vs-assam>: The High Court of Gauhati was willing to examine international guidelines on AIDS prevention. It found that the State of Assam had not fulfilled its duties in a number of areas, including a failure to provide arrangements for HIV testing in rural areas, a lack of sufficient treatment beds in the hospitals, and insufficient staffing at counseling centers. The court ordered the State to properly implement the guidelines and strategies formulated by the National AIDS Control Organization (NACO), with due regard to the London Declaration of AIDS Prevention dated Jan. 28, 1988, and the Global Strategy formulated by the World Health Organization. Additionally, the court mandated that the state implement other specific recommendations regarding program requirements, including the operation of blood banks and counseling centers, and the provision of improved treatment. The court further required the state government to investigate funding irregularities, and to take appropriate remedial measure if necessary.

the nature of public power and its public purposes.”³¹¹ In strategic litigation cases, the Indian courts have directed the State to adopt a programmatic approach to ensure economic and social rights. Such an approach in general implies the “formulation of a program of action aimed at ensuring the realization of the right in question, with the government playing a more or less central role.”³¹²

To vindicate a claim for health rights which are social in nature, the Indian courts have directed the State to act affirmatively. These judicial remedies and directives require state intervention and expenditure and require governments to provide benefits or services of a certain quality or quantity. The expenses involved do not seem to be a deterrent to judicial action.³¹³ The Indian Supreme Court has also been willing to break down the public and private divide and has held the State accountable for the promotion of the right to health in the private sphere.³¹⁴ In several cases, the Indian Supreme Court has ruled that public health is predicated on the dignity of all individuals and is therefore a cornerstone of human rights that cannot be negotiated away. The Indian Supreme Court has ruled that a healthy body is the very foundation for all human activities and that measures should be taken to

311. Upendra Baxi, *Judicial Discourse: The Dialectics of the Face and the Mask*, 35 J. INDIA L. INST. 1, 7 (1993).

312. Steiner, *supra* note 277, at 311. The Indian social action litigation on the right to health involved several cases that called for instituting a program of action. Using constitutional guarantees to health, the Indian Supreme Court has addressed the quality and safety of the nation's blood banks. *See, e.g., Common Cause, A Registered Society v. Union of India*, A.I.R. 1996 S.C. 929. In a public interest litigation concerning the safety of India's blood banks, the Supreme Court found that the current status of state and commercial blood banks posed an enormous risk to health. *Id.* In its ruling, the Supreme Court went so far as to ban commercial blood banks, to formalize a state licensing scheme for all blood banks, and to call for legislation to regulate the collection, processing, storage, distribution, and transportation of blood. *Id.*

313. *See, e.g., Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, A.I.R. 1996 S.C. 2426: The Indian Supreme Court once again addressed the need to ensure adequate medical facilities even at the risk of incurring substantial expenditure. The Court held that a state could not avoid this constitutional obligation on account of financial constraints.

See also Mahendra Pratap Singh v. State of Orissa, 1997 A.I.R. 84 (Ori.) 37, 38, at 39–40 (addressing the critical importance of providing prevention health services to the Indian population): The High Court reiterated the fundamental importance of health to a meaningful existence, holding that the government is required to assist people in obtaining adequate preventive health services by establishing primary health centers throughout the country.

314. *See Kirloskar Brothers, Ltd.*, 1996 S.C.A.L.E. (2)1 (concluding that the Union or State government is responsible for the promotion of the health of workmen in the private and public spheres).

ensure that health is preserved.³¹⁵ In many ways, rights-seeking has become a form of social change or social action in India.

At times, the Indian Supreme Court has had to balance competing rights. This jurisprudence is relevant in tobacco cases too, which may pit assertions of rights regarding employment and free expression against the right to life and health. In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*,³¹⁶ a case that involved a balancing of rights, the Supreme Court of India halted illegal limestone mining at most of the sites at issue by balancing the loss of employment of the miners with the hardship of the surrounding population and environment. The court ruled that the hardship to the miners is the price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal ecological disturbance and without undue hazard to them, their cattle, homes, and agricultural land, and without undue pollution of the air, water, and environment.³¹⁷

Other jurisdictions in South Asia have followed the Indian Supreme Court's lead and recognized the right to health and the right to a clean environment as inextricably linked to the right to life.³¹⁸ Apart from the

315. See, e.g., *id.*; see also *Parmanand Katara v. Union of India*, (1989) 3 S.C.R. 997 (holding that Article 21 of the Indian Constitution should be read to mean that the state must take every measure to preserve life).

316. *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, (1987) 1 S.C.R. 641.

317. *Id.*

318. In the Pakistani case, *Zia v. WAPDA*, P.L.D. 1994 SC 693 (1994), available at <http://www.elaw.org/node/1342>, a group of residents directly approached the Pakistan Supreme court to halt the construction of an electricity grid station by the Water and Power Development Authority in their neighborhood, citing the health hazards of electro-magnetic transmissions. Referring to the jurisprudence of the Supreme Court of India, the Pakistan Supreme Court held that the petitioners' claim was based on the right to life clause of Article 9 of the Constitution. The Court also applied the "precautionary principle" set out in the 1992 Rio Declaration, which states that lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The Court stated that this principle was of "persuasive value and commands respect." Although the Court held that it did not have the expertise to adjudicate on the different scientific and policy arguments, it ordered the WAPDA to introduce a public consultation procedure for all projects involving grid stations and power lines. It also ordered the establishment of a commission of scientists to examine the health risks.

In the Pakistani case, *In re Human Rights Case (Environmental Pollution in Balochistan)*, Human Rights Case No. 31-K/92(Q), P.L.D. 1994 S.C. 102 (1992) (on file with author), the Supreme Court of Pakistan stated that nuclear waste dumping has the potential to create environmental hazards and pollution and therefore violates Article 9 of the Constitution of Pakistan which guarantees that "[n]o person shall be deprived of life or liberty save in

South Asian courts, other courts which do not share a common law background or a constitutional tradition have nonetheless found creative ways to advance the right to health and the right to a clean environment. The international recognition of social and economic rights based on international and comparative norms has had a profound effect on litigation throughout the world.³¹⁹ A thumbnail sketch of some of these cases may help distill principles of strategic litigation that could help groups bring successful tobacco litigation.³²⁰

accordance with law.”

In *Bangladeshi case*, *Farooque v. Bangladesh*, W.P. No. 92/96 (1996), available at <http://www.elaw.org/node/1323>, the Supreme Court of Bangladesh held that consuming milk or food that might be radioactive was a threat to the right to life clause of the Bangladesh Constitution.

319. See *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.) (establishing the justiciability of health rights in South Africa).

320. *Oposa v. Factoran*, G.R. No. 101083 (July 30, 1993) (Phil.): In *Oposa*, a class action suit was brought “to ‘prevent the misappropriation or impairment’ of the Philippine rainforests and to ‘arrest the unabated hemorrhage of the country’s vital life support systems and continued rape of Mother Earth.’” The Court found that the Philippine constitutional policy includes the protection and the right of the people to a clean environment. The court also found that the proposed government actions violated the constitutional rights of the Plaintiffs and the Plaintiff minors “to a balanced and healthful ecology in accord with the rhythm and harmony of nature.” What was groundbreaking about this case was that the court held that the Plaintiffs could represent themselves and future generations in a class action suit.

Sentencia No. T-415/92, Corte Constitucional de Colombia [Judgment No. T-415/92, Constitutional Court of Colombia], *Fundepublico v. Mayor of Bugalagrande*, June 17, 1992, available at <http://web.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1992/Tutela/T-415-92.htm>: In *Fundepublico*, the Constitutional Court of Colombia recognized the right to a healthy environment as a fundamental human right. The Court found that these rights are contained in the Colombian Constitution and also made reference to “recent developments in international law.”

Tribunal Superior de Justicia [Trib. Sup.], Mar.2, 1999, *Valentina Norte Colony, Defensoria de Menores No.3 v. Poder Ejecutivo Municipal* (Arg.): This case was brought by the Children’s Public Defender of the Province of Nuequen on behalf of the children of the rural colony of Valentina Norte who were drinking water polluted with hydrocarbons. The Supreme Court upheld the decision of the court of appeals, which ordered the State Government to provide 100 litres of drinkable water per day to each individual member of the families living in the colony. The Supreme Court based part of its arguments on the right to health guarantee in the CRC and the Argentinian Constitution.

Poder Judicial de la Nación, Causa no. 31.777/96, June 2, 1998, *Viceconti v. Ministry of Health and Social Welfare* (Arg.): In *Viceconti*, the plaintiff and the National Ombudsman of Argentina filed an action seeking protection of the right to health of people who were living in areas in Argentina affected by hemorrhagic fever. The Federal Court of Appeals in Argentina found that any individual could bring complaints concerning the right to health due to the constitutional incorporation of international treaties referring to the right, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the American Declaration on the Rights and Duties of Man. The Court also

The link between environmental quality and the right to life has now been established even by the International Court of Justice.³²¹

noted that the Constitution should be interpreted as consistently as possible with social justice and the promotion of the general welfare. The Court held that the government was legally obliged to intervene to provide health care when the health of individuals could not be guaranteed either by themselves or the private sector.

Bermudez v. Ministerio de Sanidad Y Asistencia Social, Case No. 15.789, Decision No. 916 (July 15, 1999) (Venez.): In *Bermudez*, the Court stated that the right to health and the right to life of the petitioners were closely linked to the right to access the benefits from science and technology. The Court made orders directing the Ministry to provide anti-retrovirals, medications necessary for treating opportunistic infections and diagnostic testing, free of charge for all Venezuelan citizens and residents. The Ministry was also ordered to develop the policies and programs necessary for affected patients' treatment and assistance, and make the reallocation of the budget necessary to carry out the Court's decision.

Mendoza & Ors v. Minister of Public Health and the Director of the National AIDS-HIV-STI Program, Tribunal Constitucional, 3ra. Sala, Ecuador, Resolucion No. 0749-2003-RA (Jan. 28, 2004): In *Mendoza*, the Constitutional Court of Ecuador ruled that the State must take precautions to safeguard the right of Ecuadorians to health and that the right to health also forms part of the right to life. The right to health grants citizens the right to ensure that the State not only adopts policies, plans and programs with regard to general health, but also obliges them to draw up regulations, carry out research and establish public policies by setting up appropriate bodies and making them available to the population. The Court found that there had been a failure on the part of the Ministry in that it had not provided an immediate and effective solution, as was its duty and that this caused serious damage to the quality of life of those suffering from HIV/AIDS. This omission violated rights guaranteed by the Constitution and international instruments ratified by Ecuador and incorporated into its domestic legislation.

321. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 60, 91–92 (Sept. 25, 1997), available at 1997 WL 1168556 (separate opinion of Vice-President Weeramantry): Former Vice President Weeramantry of the International Court of Justice stated that "[t]he protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself." Weeramantry further stated that the people of Hungary and Slovakia are "entitled to the preservation of their human right to the protection of their environment." *Id.* at 89.

Purohit and Moore v. Gambia, African Commission on Human and People's Rights, Communication 241/200 (2003), available at <http://www1.umn.edu/humanrts/africa/comcases/241-2001.html>: In this case, the Human Rights Commission stated that Gambia fell short of satisfying the guarantees of Articles 16 and 18(4) of the enjoyment of the right to health which is crucial to the realization of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind. The Commission referred to the standards outlined in the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care and interpreted the obligation on States Parties as taking "concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any kind."

Bandhua Mukthi Morcha v. Union of India and Others, 1984 A.I.R. 802 (1983), available at <http://www.indiankanoon.com/doc/595099/>: In this landmark case, the Indian Supreme Court first addressed the conditions necessary for the enjoyment of health. The Court held that the workers at the stone quarries were deprived of their right to life because of poor working

Additionally, regional human rights commissions have upheld the right to health as a fundamental human right. For example, the African Commission³²² and the Inter-American Commission³²³ have upheld the right to a minimum standard of health. These global and regional approaches to human rights are often complementary and can be mutually reinforcing.

conditions. The court further concluded that the right to live with human dignity also includes protection of the health of individuals and that the state was required to provide workers with clean drinking water, sanitation facilities, and medical facilities to protect their health.

322. *See, e.g.,* Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire, African Comm'n on Human & Peoples' Rights, Comm. Nos. 25/89, 47/90, 56/91, 100/93 (1995), available at http://www1.umn.edu/humanrts/africa/comcases/25-89_47-90_56-91_100-93.html: The African Commission on Human Rights held that the failure of the Zaire government to provide basic services necessary for a minimum standard of health, such as safe drinking water, electricity and the shortage of medicine, constituted a violation of the right to enjoy the best attainable state of physical and mental health and the obligation of the State to take the necessary measures to protect the health of its people as a fundamental right set out in Article 16 of the African Charter. The Commission also held that the failure of the government to provide basic services necessary for a minimum standard of health was a violation of the right to enjoy the best attainable state of physical and mental health and the obligation of the State to take the necessary measures to protect the health of its people as set out in Article 16 of the African Charter.

See, e.g., SERAC and CESR v. Nigeria, African Commission on Human & Peoples' Rights, Comm. No. 155/96 (2001), available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>: Petitioners alleged that the right to a clean environment and family rights were violated by the operations of oil corporations in Ogoniland. The African Commission found that the Ogoni had suffered violations of their right to health under Article 16 of the African Charter and the right to a clean environment under Article 24 due to the government's failure to prevent pollution and ecological degradation. It also concluded that the failure to monitor oil activities and involve local communities in decisions violated the State's duty to protect its citizens from exploitation and despoliation of their wealth and natural resources.

323. *See, e.g.,* Brazil, Case 7615, Inter-Am. C.H.R., Resolution No. 12/85 (1985): The Inter-American Commission on Human Rights recommended that, among other things, "the Government of Brazil continue to take preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases." This case involved the Brazilian government's sanctioning of a road-building program that displaced Yanomami Indians from their ancestral land and left them exposed to epidemics including influenza, TB, and measles, among others. They argued that the government had not adequately taken action to address these health crises. The failure of the Brazilian government to fulfill their positive obligations to provide the Yanomami Indians with a park for the protection of their heritage or to protect them from disease and ill health amounted to, *inter alia*, a violation of their right to residence and movement and the right to the preservation of health and to well-being as recognized in Articles VIII and XI of the American Declaration of the Rights and Duties of Man.

D. Extending Human Rights Litigation to Protect Women and Children from Tobacco

An examination of leading cases across jurisdictions on women's rights enforcement reveals interesting insights into how international human rights norms can support domestic human rights claims and provide a forum for the enforcement of international instruments in tobacco litigation. These innovative cases and principles from around the world can open up a range of creative new possibilities to combat tobacco. Unequal customary practices subordinate women and limit their agency in decision making in the home and in public. Legal challenges to unequal laws and traditional practices that subordinate women open the door for similar challenges to unequal practices that target women especially in discriminatory advertising practices and marginalize women in low paying jobs in the *beedi* industry.

Using the ferment of public interest litigation and borrowing a page from the Indian Social Action litigation revolution, petitions can be filed for the protection of women and children from exposure to secondhand smoke in most civil law and common law countries. The impact on their physical and reproductive health is a clear violation of the right to life. Courts can be asked to issue directives to state governments to collect gender disaggregated data, to conduct educational campaigns focusing on secondhand smoke, to report the extent of the prevalence of secondhand smoke, and to direct the state to take preventive action. Appearing on behalf of petitioners, NGOs could ask the government for a clear plan of action to address secondhand smoke and a budget for implementing alternative social action plans to veer families away from smoking in the home.

Courts have also held that the special vulnerability of petitioners can be taken into consideration when determining liability and damages.³²⁴ Consequently, the special vulnerability of children and women to tobacco is an issue that must be considered in litigation. Moreover, courts have held that short-term financial considerations, such as the possible loss of revenue to the government due to the control of tobacco,

324. Special Jurisdiction Appellate Court, Bill of Review 0208625-3 (Paraná, Braz.) (holding that the special vulnerability of one of the petitioners could be taken into consideration in deciding that it was illegal to interrupt the water supply even when the consumer had defaulted) (on file with author).

cannot justify the breach of fundamental human rights.³²⁵ Equal protection of the law and nondiscrimination arguments have been used to strike down gender-based unequal employment practices in different parts of the world. Litigation filed under the CEDAW has been one way to change national legislation and remove gender discrimination. In a number of cases, the CEDAW has been successfully invoked to persuade domestic courts to refer to international standards when applying existing law. In courts around the world, judges have used international law to vindicate women's rights.³²⁶ Reliance on international law also reveals a concern for the rule of law and the dependence on universal human rights values as a way to safeguard women's rights.

The equality clauses of the CEDAW³²⁷ and CRC,³²⁸ as well as constitutional antidiscrimination clauses, can be used to challenge exemptions from smoking bans. These exemptions raise discrimination challenges, as the indirect consequence of such exemptions will be that both employees working in these premises and members of the public visiting these premises will not be afforded the protection from exposure to smoke which the law affords to those working at or visiting similar enclosed premises. This differential treatment triggers human rights guarantees against nondiscrimination. Therefore, if a state chooses to introduce a smoking ban in order to protect life and health, it will be discriminating in the protection afforded to people if it chooses to

325. *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624, 685 ¶ 85 (Can.) (holding that the "financial considerations alone may not justify the infringement of the Charter of Rights and Freedoms").

326. *Ephraim v. Pastory & Anor*, High Ct. Civ. App. 70/89 (Feb. 22, 1990) (Tanz.) (on file with author): The Tanzanian High Court cited the CEDAW in a decision invalidating a customary law that prevented women from inheriting clan land from their fathers. The Court found the law violated Tanzania's own Bill of Rights as well as CEDAW and other international human rights treaties which Tanzania has acceded. The Court stated that "[t]he principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall."

Muojekwu v. Ejikeme, (2005) 5 N.W.L.R. 402 (Nig.) (on file with author): The Nigerian Court of Appeals invoked international law in determining the legitimacy of a custom which subordinated women. The court emphasized that Nigeria had ratified the CEDAW and therefore Nigeria had to live up to its international obligations. The court stated that Article 2 of the CEDAW which prohibits discrimination against women in all of its forms and agree to policy of eliminating discrimination against women, applied to the woman in question.

327. See CEDAW, *supra* note 10, arts. 2 & 4.

328. CRC, *supra* note 9, art. 2.

protect a certain public space and not another, unless there is a reasonable and objective justification for doing so.

Similarly, as discussed before, smoking in the home takes place in the context of power and control. When women and children are unable to control harm in the family due to powerlessness, it can amount to violence in the home. Many domestic violence laws around the world define violence to cover physical, psychological, sexual, and economic harm.³²⁹ Smoking in front of women and children when it is unwanted amounts to physical and psychological abuse. Just as domestic violence is no longer legitimized on the grounds that it takes place in private, the fact that smoking takes place in the home cannot exempt it from the coverage of the CEDAW.

Although not a justiciable issue, spending family income on cigarettes when the women and the children in the family have other important economic needs can also amount to economic abuse.³³⁰ The Indian

329. *Compare* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., 85th plen. mtg., art. 1, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (defining violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”) with Decree on the Proclamation of the Law on Protection from Domestic Violence (2005) (Bosn. & Herz.) (characterizing domestic violence as “any act of inflicting physical, psychological, sexual or economic harm or suffering, as well as threats as regards the aforementioned, and lack of due care and attention which may seriously impede family members from enjoying their rights and freedoms in all areas of public and private life which are based on equality”) (on file with author) and Catherine So-kum Tang et al., *Definition of Violence Against Women: A Comparative Study in Chinese Societies of Hong Kong, Taiwan, and the People’s Republic of China*, 17 J. INTERPERS. VIOLENCE 671, 684 (2002) (studying how the broad definition included the infliction of psychological harm, but that participants relied more on the infliction of psychological harm as compared to using violation of women’s rights or as psychological harm as determining criteria for violence against women).

330. Many domestic violence laws now define violence to cover physical, psychological, and economic harm. For instance, one of the most recent domestic violence laws to be passed, India’s 2005 Protection of Women From Domestic Violence Act, defines domestic violence broadly to include any relevant act, omission, commission, or conduct of the respondent. The Protection of Women from Domestic Violence Act, No. 43 of 2005; INDIA CODE (2005). Under the Act, domestic violence covers all harms, injuries, or endangerment to the health, safety, life, limb or well-being of another, whether caused by mental, physical, sexual, verbal, emotional, or economic abuse. *Id.* art. 3(a). Also, most international human rights norms like the Declaration on the Elimination of Violence against Women (DEVAW) and *General Recommendation No. 19* provide a broad definition of domestic violence to cover physical, psychological, and economic abuse. See U.N. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, Art. 1, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (referred to as DEVAW); CEDAW, *General Recommendation No. 19*, *supra* note 10.

courts have ruled on the right to food as an essential concomitant of the right to life.³³¹ The Indian National Human Rights Commission has also ruled that when the right to life is read with the requirements set out in Article 39(a) of the Constitution (a directive principle that requires the State to direct its policy towards upholding its citizens' right to an adequate means to livelihood) and in Article 47 (which sets out the State's duty to raise the level of nutrition and standard of living of its people as a primary responsibility), the right to food is a justiciable constitutional right.³³² Given the direct link between tobacco consumption and the deprivation of food in the family, especially affecting women and children, litigation on tobacco can positively affect food security in countries where more money is spent on tobacco than on food for the family.

Further, as discussed before, children who work in the *beedi* industry are working in a hazardous environment, often in breach of several fundamental rights protecting children. The Indian Supreme Court in

331. *People's Union for Civil Liberties v. Union of India*, (1997) 1 S.C.C. 301: In this case, the Indian Supreme Court ordered the Central Government to collate all the facts and thereafter take necessary action in order to ensure the implementation of the government's food distribution schemes. The Court also ordered that the Food for Work Programme be implemented in the various States. The Court directed the States to identify Below Poverty Line (BPL) families and commence distribution of food. The Court also directed the State Government to implement the Mid-Day Meal Scheme by providing every child in every government and government-assisted Primary School with a prepared midday meal with a minimum content of 300 calories and 8–12 grams of protein each day of school for a minimum of 200 days. In drought affected areas, mid-day meals were to be supplied even during the summer vacation. The court further directed that safe drinking water should be provided for children of primary schools. The court even went so far as to direct that in the appointment of cooks and helpers, preference should be given to Dalits, Scheduled Castes, and Scheduled Tribes. All Chief Secretaries/Administrators were directed to file compliance reports in regard to these directions. The court also appointed a Commissioner to report on the implementation of the court orders, to look into grievances that may persist, and to recommend a course of action to ensure compliance with the Court's order. Further, the Courts ordered that States should identify beneficiaries from the National Old Age Pension Schemes, Integrated Child Development Schemes, National Maternity Benefit Schemes, National Family Benefit Schemes, and the Antyodaya Anna Yojana (AAY) programme (a food-based social security programme for destitute households). The Court ordered that once these families were identified, it must ensure that full compliance under the Scheme is carried out. The Court also directed that costs for a cooked meal, under no circumstances, shall be recovered from the children or their parents. Moreover, the Court ordered that primitive tribes, widows, and other single women with no regular support be prioritized.

332. *Shri Chaturanan Mishra*, Case No. 37/3/97-LD, India Nat'l H.R.C. (2003).

*M.C. Mehta v. The State of Tamil Nadu I and II*³³³ and *M.C. Mehta v. Union of India*³³⁴ has directed that measures be taken to withdraw children from hazardous occupations and to establish a welfare fund for them. The Supreme Court has also regulated the working conditions in non-hazardous occupations. Given this legal framework and the international rights framework, child labor in tobacco cultivation can be successfully challenged in India, and the court can be asked to issue a directive to the Indian legislature to classify child labor in tobacco cultivation as a worst form of child labor.³³⁵ This could create a new paradigm in test case litigation around the world.

In several cases (analyzed below) the best-interest-of-the-child principle of the CRC was used to hold states accountable for the protection of children's rights. These cases can open the door for similar litigation that can hold parents and States alike responsible under Articles 3, 6, and 24 of the CRC for the protection of children from exposure to secondhand smoke inside and outside the home.

Apart from using the CRC to address child labor in tobacco cultivation, the CRC can also be used as a benchmark in custody decisions affecting children exposed to secondhand smoke in the family. In several cases, the CRC has been used as a standard in custody decisions.³³⁶

The CRC can be read broadly to prohibit the exposure of children to tobacco and secondhand smoke as part of the principle of the best interest of the child. Similarly, in a range of cases in the U.S., smoking by a parent was taken into consideration in custody cases. In *Unger v.*

333. *M.C. Mehta v. Tamil Nadu*, A.I.R. 1991 S.C. 417; *M.C. Mehta v. Tamil Nadu*, A.I.R. 1997 S.C. 699.

334. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086.

335. A novel enforcement mechanism has been adopted by Pakistan which calls for, under Section 12 of the Pakistan Act, notices of the types of work prohibited for children and penalties for such contravention to be displayed in a conspicuous place. See *Employment of Children Act*, § 12 (1991) (Pak.), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/22707/64834/E91PAK01.pdf>.

336. See, e.g., *Patricia Molu v. Cidi Molu*, Civil Case 30 of 1996, Supreme Court, Port Vila, Vanuatu (May 15, 1998) (applying the best-interest-of-the-child principle of the CRC when deciding a custody dispute). In deciding that the welfare of the child is paramount, the court relied upon Article 3(1) of the CRC which provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." CRC, *supra* note 9, art. 3(1).

Unger,³³⁷ the New Jersey Superior Court explored the scientific evidence connecting secondhand smoke to childhood disease. The Court ruled that even a parent's constitutionally protected right may be restricted upon a showing that the parent's activity may tend to impair the physical health of the child.³³⁸ In a case where a thirteen year-old child demanded that his mother quit smoking in his presence, the New York Family Court ruled that the best interest of the child dictated that he was not to "reside in, or visit, or occupy any residence or motor vehicle of the parties in which smoking of any type occurs at any time."³³⁹ In a similar case, the court ruled that the mother's smoking in front of a child who had chronic asthma was tantamount to child abuse.³⁴⁰

Judge William F. Chinnock has argued that those cases that recognize the danger of secondhand smoke on children are in support of the best-interest-of-the-child principle that a family court should take into account when determining visitation and custody issues.³⁴¹ His arguments illustrate that family court, "on its own initiative and regardless of the health of the child has a legal duty to consider the danger of secondhand smoke to children as a significant, possibly determinative (where child has health problems), factor in deciding issues of visitation and custody."³⁴² These cases also support the conclusion that courts, as a standard practice, may issue court orders restraining anyone from smoking in the presence of children with health problems.³⁴³

CONCLUSION

Tobacco control law and policy flows from the right to life and is built upon several layers of other rights including the rights to equality, health, education, a clean environment, and information. The connection between tobacco control law and policy and rights is

337. *Unger v. Unger*, 644 A.2d 691, 693 (N.J. Super. Ct. Ch. Div. 1994).

338. *Id.*

339. *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 817 (2002).

340. *Skidmore-Shafer v. Shafer*, 770 So. 2d 1097 (Ala. Civ. App. 1999).

341. Chinnock, *supra* note 43, at 801.

342. *Id.*

343. *Id.* at 801-02.

demonstrably clear when we examine how these intersecting rights require effective tobacco control programs.

The most powerful value inherent in the human rights framework is the way in which these guarantees provide an international body of laws to hold governments responsible for the vindication of those rights. States, as signatories to these treaties, must draft enabling national legislation in compliance with the rights these treaties guarantee. The international human rights framework has both enormous symbolic effect and concrete impact when domestic laws afford little or no recourse. Rights have also been used as interpretive tools to enlarge the interpretation of domestic laws, to clarify ambiguities, and to resolve conflicts in laws.³⁴⁴

The right to be free from the dangers of secondhand smoke has been tested in innovative litigation efforts in several countries where courts have ruled that tobacco control is a progeny of constitutional and human rights guarantees to a meaningful life. Human rights law rests on the cornerstone of antidiscrimination and the protection of the most vulnerable segments of the population; tobacco's impact on women and children makes the value of a human rights-based approaches to tobacco control even more pressing and immediate.

The now established indivisibility of rights³⁴⁵ affords a channel through which the right to health bound up with the right to life can be reconceptualized as an international customary law. Tying the right to be free of secondhand smoke with the right to life raises this right to a customary human rights norm, or a peremptory norm, which is considered non-derogable and therefore imposes binding obligations on countries including the United States that have not ratified certain treaties.³⁴⁶ For states that are not parties to the relevant human rights treaties, generally accepted standards of human rights are legally binding upon them according to customary international law.³⁴⁷

344. Across the world, human rights have been the inspiration for legislative reform; in fact, it has been argued that human rights are the parents of law since they motivate and inspire specific legislation. "Providing inspiration for legislation is certainly one way in which the ethical force of human rights have been constructively deployed." Amartya Sen, *Human Rights and the Limits of the Law*, 27 CARDOZO L. REV. 2913, 2918 (2006).

345. Vienna Declaration, *supra* note 46, ¶ 18.

346. Customary human rights norms are so fundamental that they are non-derogable. See generally Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Kinney, *supra* note 48, at 1457.

347. The ICCPR's Human Rights Committee has developed interpretations of its

Under treaty obligations, States Parties must exercise due diligence in implementing treaty provisions. In certain countries, courts have held that a state's failure to act or a state's inaction in combating a violation of human rights can create accountability or a cause of action.³⁴⁸ This discursive approach can provide a legal basis for action where non-investigation and nonprosecution are alleged to have taken place in cases concerning the tobacco industry. The state is obliged to take concrete measures in order to meet its obligation to ensure the right to health. At a minimum, it cannot not take action. An act of omission by the state or the failure to take appropriate steps to safeguard the health of

substantive articles by issuing General Comments. *General Comment 04* interprets Article 3, which requires states to ensure for all individuals the rights recognized in the ICCPR as imposing a positive obligation on states to remedy sex discrimination. ICCPR, Human Rights Comm., *General Comment No. 28: Equality or Rights Between Men and Women (Article 3)*, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000). This positive obligation requires that states not only take measures to protect women, such as the enactment of laws, but also take measures of affirmative action designed to ensure the positive enjoyment of rights. It also imposes on states a duty to obtain information regarding the role of women in its jurisdiction in order to determine specifically what additional measures need to be taken. Thus, even in the absence of local legislation, or when there are gaps in the enacted legislation, women's rights advocates can argue that as a fundamental human right, substantive gender equality is a norm to which countries are obliged to conform.

348. In the famous case, *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), the Inter-American Court of Human Rights held that states have an affirmative legal obligation to investigate and prosecute rights violators (including private persons who are not agents of the government) and that the government must compensate victims of rights violations. The Court also reaffirmed that states are obliged to investigate every situation involving a violation of rights protected by international law. *Id.* It discussed the scope of the duty of the state, under Article 1 of the Inter-American Convention on Human Rights, to ensure the rights within the treaty to all persons within its jurisdiction. *Id.* Finally, the Court noted that a state fails to comply with this duty when it allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention. *Id.*

The Court's judgment articulated one of the most significant assertions of state responsibility for private acts by private individuals. This norm could be used creatively by women's rights advocates to hold states responsible for private acts of discrimination. The opinion of the Court could also be applied, by extension, to Article 2 of the International Covenant on Civil and Political Rights (ICCPR), which requires States Parties to ensure to all individuals the rights recognized in that Covenant. ICCPR, *supra* note 68.

In the Brazilian case, *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 47 (2001), the Inter-American Commission ruled that there was clear discrimination against women who are attacked resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules.

See also ECOSOC, Comm. on Human Rights, *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45*, ¶ 72, UN Doc E/CN.4/1995/42 (Nov. 22, 1994).

people, including the proper implementation of relevant legislation, is a violation of the right to health.³⁴⁹

Rights are not closed categories, and it is important to resist categorical thinking about the nature of rights. Jonathan Mann, the distinguished humanist, presciently argued that “helping to educate people about human rights may ultimately be as important, or even more important, for their health than any specific AIDS educational program.”³⁵⁰ Similarly, a dynamic understanding of human rights will stretch the articulation of rights to propel progressive transformation in the field of tobacco control.

349. ECOSOC *General Comment 14*, *supra* note 18, ¶ 49:

Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone’s right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.

350. Mann, *supra* note 21, at 204.

